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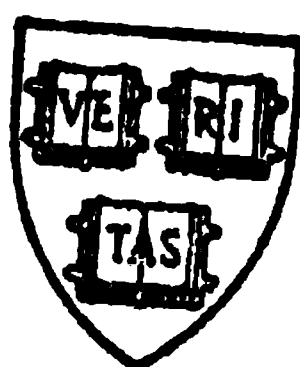
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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF INDIANA,**  
**WITH TABLES OF THE CASES REPORTED AND CASES**  
**CITED AND AN INDEX.**

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**By JOHN L. GRIFFITHS,**  
**OFFICIAL REPORTER.**

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**VOL. 119,**  
**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1888,**  
**NOT PUBLISHED IN VOLS 116, 117 and 118, and CASES**  
**DECIDED AT THE MAY TERM, 1889.**

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**INDIANAPOLIS:**  
**THE BOWEN-MERRILL CO.**  
**1889.**

Entered according to the Act of Congress, in the year 1889,  
By JOHN L. GRIFFITHS,  
In the Office of the Librarian of Congress, at Washington, D. C.

*Rec. Dec. 18, 1889.*

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FOUNDRY.



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**JUDGES**  
**OF THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF INDIANA,**  
**DURING THE TIME OF THESE REPORTS..**

---

**HON. BYRON K. ELLIOTT.\* †**

**HON. JOSEPH A. S. MITCHELL. ‡**

**HON. JOHN G. BERKSHIRE. §**

**HON. WALTER OLDS. §**

**HON. SILAS D. COFFEY. §**

**\* Chief Justice at the November Term, 1888, and at the may Term, 1889.**

**† Term of office commenced January 3d, 1887.**

**‡ Term of office commenced January 6th, 1885.**

**§ Term of office commenced January 7th, 1889.**

OFFICERS  
OF THE  
SUPREME COURT.

---

CLERK,  
WILLIAM T. NOBLE.

SHERIFF,  
JAMES L. YATER.

LIBRARIAN,  
WILLIAM W. THORNTON.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1888, IN THE SEVENTY-  
THIRD YEAR OF THE STATE.

No. 13,667.

DAVIS *v.* THE CITY OF CRAWFORDSVILLE.

**MUNICIPAL CORPORATION.**—*Street Improvements.*—*Injury to Property-Owner by Water.*—*Liability of Corporation.*—A municipal corporation is liable in damages if it collects water in an artificial channel and pours it upon the land of another; but it is not liable for consequential damages caused by the grading and improvement of its streets, unless the work be negligently performed.

From the Montgomery Circuit Court.

*B. Crane* and *A. B. Anderson*, for appellant.

*W. W. Thornton*, *P. S. Kennedy* and *S. C. Kennedy*, for appellee.

**ELLIOTT, C. J.**—Appellant's counsel say that: "The theory upon which the complaint is drawn is, that a municipal corporation has no right to collect surface water in an artificial channel and cast it in a body upon another's property." The theory is sound, for a municipal corporation is liable in

119	1
131	143
119	1
142	618
119	1
166	21

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Davis. v. The City of Crawfordsville.

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damages if it collects water in an artificial channel and pours it upon the land of another. *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. Rep. 86); *City of Crawfordsville v. Bond*, 96 Ind. 236; *Lipes v. Hand*, 104 Ind. 503; *Rice v. City of Evansville*, 108 Ind. 7; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 548; *Pye v. City of Mankato*, 36 Minn. 373 (1 Am. St. 671, and authorities collected in note). If the complaint embodies this theory and contains facts supporting it, then the court erred in sustaining the demurrer of the appellee. But the question is, does the complaint do this? This question must be determined from the allegations of that pleading. They are, in substance, these: That the city opened new streets, some running parallel with Main street and some intersecting it; that it so established the grade of the new streets as to drain and collect the surface water from a large scope of land in the western part of the city and divert it from its natural course into Main street; that the water thus drawn into Main street and cast upon the plaintiff's land was fully four-fifths of all the water which now runs through that street, and that it was thus caused to flow upon plaintiff's land, which, before that time, was dry and free from overflow. Our judgment is, that the complaint neither embodies the theory now declared by counsel to be that upon which they base a right to a recovery, nor states facts supporting it. The facts pleaded do no more than supply the basis for the conclusion that the plaintiff suffered an injury from the grading and improvement of the streets of the municipality. They do not, therefore, constitute a cause of action. For many years it has been the settled law of this State that a municipal corporation is not liable for consequential damages caused by the grading and improvement of its streets, unless the work was negligently performed. *Macy v. City of Indianapolis*, 17 Ind. 267; *Weis v. City of Madison*, 75 Ind. 241, and cases cited; *Cummins v. City of Seymour*, 79 Ind. 491; *Platter v. City of Sey-*

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 Long v. Crosson.
 

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*mour*, 86 Ind. 323; *City of North Vernon v. Voegler*, 103 Ind. 314; *Rice v. City of Evansville, supra*.

The trial court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed May 11, 1889.

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 No. 13,589.

## LONG v. CROSSON.

**MARRIED WOMAN.**—*Separate Real Estate.*—*Conveyance to Husband.*—*Mortgage.*—*Contract of Suretyship*—*Estoppel.*—Where a wife transfers her separate real estate to her husband, by conveyances importing a money consideration, for the purpose of enabling him to mortgage it, as his property, to secure a loan for his own benefit, she will be estopped, as against a mortgagee who is not shown to have had knowledge that the conveyances were a mere contrivance to evade the statute (section 5119, R. S. 1881) prohibiting her from entering into contracts of suretyship, from asserting that the transfer was not *bona fide*.

From the Benton Circuit Court.

*D. E. Straight* and *U. Z. Wiley*, for appellant.

*M. H. Walker* and *I. H. Phares*, for appellee.

**MITCHELL, J.**—The following facts present the question for decision: Mattie Long, wife of James Long, being the owner in her own right of a certain lot in the town of Fowler, in Benton county, executed a deed, in which her husband joined, by which she conveyed the lot to John Dempsey for the nominal consideration of fifteen hundred dollars. Dempsey, on the same day, for a like consideration, conveyed the property to James Long, husband of Mattie Long. There

119	3
128	22
119	3
131	193
132	387
119	3
138	218
119	3
149	359
119	3
154	287
154	289
154	597
119	3
162	639
119	3
164	394

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Long v. Crosson.

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was no consideration actually paid or agreed to be paid for either of the foregoing conveyances, they having been made merely to invest James Long with the title, so that he might secure a loan of five hundred dollars which he desired to make for his own benefit. Afterwards, on the 17th day of October, 1881, Crosson, upon the recommendation and solicitation of Dempsey, made a loan of five hundred dollars to Long and took a mortgage upon the property owned and conveyed as above, in which both Long and wife joined, as security. Dempsey, who knew of the purpose for which the title had been transferred from Mrs. Long to her husband, furnished Crosson two hundred and fifty dollars of the money thus loaned to Long, and took his note for the amount. The title had stood in the name of James Long some six months at the time Crosson made the loan, and there was evidence tending to show that he took the security upon the faith of an abstract of title furnished him, and that he had no knowledge that the title had been transferred merely to enable Long to make the loan, and to evade the statute which prohibits a married woman from entering into any contract of suretyship by pledging her property for the debt of another, or otherwise. The title has remained in the husband ever since the above mentioned conveyances were made, in April, 1881.

The foregoing facts appeared in a suit by Crosson to foreclose his mortgage taken as above. Upon the facts thus summarized, the court below gave judgment of foreclosure against both the mortgagors. The wife prosecutes this appeal, and on her behalf it is insisted that the facts show nothing more than an indirect attempt to do that which is prohibited by section 5119, R. S. 1881, which declares, in effect, that a married woman shall not, in any manner, enter into any contract of suretyship, and that all such contracts as to her shall be void.

We fully concur in the view that the statute which removes the disabilities of married women, to the extent that



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Long v. Crosson.

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it does, was designed for their more complete protection, and to enable them the better to use and enjoy their separate property. The above section, which prohibits married women from entering into contracts of suretyship, was intended to secure to them or their estates the exclusive benefit of their contracts, and to protect them and their property from the importunities of others. Accordingly, the rulings have uniformly been that the law should be liberally and justly construed, so as not to permit injustice on the one hand by trick or evasion, or by fraud or misrepresentation as to the character of the contract on the other. *Cupp v. Campbell*, 103 Ind. 213; *Orr v. White*, 106 Ind. 341; *McCormick, etc., Co. v. Scovell*, 111 Ind. 551; *Jouchert v. Johnson*, 108 Ind. 436; *Rogers v. Union, etc., Life Ins. Co.*, 111 Ind. 343; *Lane v. Schlemmer*, 114 Ind. 296; *Cook v. Walling*, 117 Ind. 9.

Conformable to the maxim which declares that whatever is prohibited by law to be done directly can not legally be effected by an indirect and circuitous contrivance (Broom Legal Max. 432), it was held in *McCormick, etc., Co. v. Scovell, supra*, that where a husband and wife joined in conveying real estate owned by them as tenants by entireties, to a third person, the latter conveying to the husband so as to enable him to mortgage the property to secure an antecedent debt owing by him to another, who knew of the purpose for which the several transfers were made, the deeds and mortgage constituted substantially one transaction and were void as an evasion of the statute which prohibits a married woman from entering into a contract of suretyship. Whatever device may be resorted to for the purpose of evading the statute, if the person seeking to enforce the contract knew of, or participated in, the design, or purposely remained ignorant, courts will deal with the transaction according to its substance, regardless of the form in which it may have been disguised. In the present case the title was transferred from the wife to her husband more than six months before the mortgage in suit was taken. It has remained in the hus-

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Long v. Crosson.

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band ever since, notwithstanding more than seven years have elapsed, with, so far as appears, the fullest approbation of his wife. Although the evidence is not entirely satisfactory upon the point, there was testimony tending to show that the mortgagee had no knowledge of the purpose for which the title had been transferred from Mrs. Long to her husband; nor does it appear that she was in any way overreached or misled by her husband or any one else. She purposely, knowingly and deliberately transferred the title to her separate property to her husband with the intention that he should thereafter, as he might find opportunity to make a loan, mortgage it as his property, for his own benefit, to secure the loan. As against one who subsequently made the anticipated loan, and who is not shown by clear and satisfactory evidence to have had knowledge that the conveyances were a mere contrivance to evade the statute, she is now estopped from asserting that the transaction was of a character different from what it appeared to be.

Evidence was admitted to show that a building formerly situate on the lot in controversy had been destroyed by fire, and that the husband had made proof of the loss and had collected seven hundred dollars insurance upon a policy theretofore taken on the building in his name. There was no prejudicial error in this ruling. The most that can be said of it is that the evidence was immaterial. There was no error.

The judgment is affirmed, with costs.

Filed May 10, 1889.

## Hostetter v. Auman.

No. 13,630.

## HOSTETTER v. AUMAN.

119	7
144	161
146	87
119	7
153	583

**PLEADING.—*Special Denial.—Demurrer.***—A paragraph of answer which pleads facts in negation of the material facts alleged in the complaint, is a special denial and is good on demurrer.

**CONTRACT.—*Merger of Previous Negotiations.***—Where a written contract is executed all previous negotiations and understandings are merged in the writing, and parol evidence is not admissible to vary or control its legal effect.

**SAME.—*Written Contract of Sale.—Conversion.—Evidence.***—Where a writing, signed by A., evidences a sale of timber by him to B. and states the consideration and its payment, the title thereby passes to B., and in an action by him against C. for the conversion of the timber it is not competent to prove by A. that he understood the writing to be a receipt, and that he supposed he was selling the timber to C., with whom he had previously negotiated its sale by parol, B. merely paying the purchase price for the latter.

**SAME.—*Previous Parol Contract of Sale.***—In such case C., will not be allowed to testify as to previous negotiations between himself and A., resulting in a parol contract for the purchase of the timber, nor as to an agreement between himself and B. whereby the latter was to pay the purchase-price for C., who was to work the timber into staves, repay B. the sum advanced, after which they were to divide the profits equally.

**SAME.—*Contract for the Sale of Growing Timber.—Statute of Frauds.—Instructions.***—A contract for the sale of growing timber is a contract for the sale of an interest in land, and must be in writing in order to bind either party. For instructions upon this subject, the refusal to give which is held to be error, see opinion.

From the Montgomery Circuit Court.

*T. E. Ballard, E. E. Ballard and M. E. Clodfelter*, for appellant.

*B. Crane, A. B. Anderson and N. P. H. Proctor*, for appellee.

**BERKSHIRE, J.**—The appellant sued the appellee to recover damages for an alleged wrongful conversion of timber. The appellee answered the complaint, in two paragraphs. The

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Hostetter v. Auman.

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appellant demurred to the second paragraph, which demurrer the court overruled. The appellant saved an exception and filed a reply. The case, being at issue, was tried before a jury and a verdict returned for the defendant. The appellant filed a motion for a new trial, which was overruled by the court and the proper exception reserved, after which the court rendered judgment for the appellee.

There are two errors assigned: 1. The court erred in overruling the demurrer to the second paragraph of the answer. 2. The court erred in overruling the motion for a new trial.

The second paragraph of the answer did not admit the allegations of the complaint and offer facts in avoidance thereof; the facts pleaded were in negation of the main fact stated in the complaint—the ownership of the timber alleged to have been converted. The answer was a special denial, and as a pleading of that character was good; but as the same facts were provable under the general denial, there would have been no available error had the court sustained the demurrer.

The court erred in overruling the motion for a new trial. There was no controversy as to the appellee having converted the timber to his own use, as alleged in the complaint, the only controverted question being as to the ownership of the timber.

It was conceded that at a certain date, to wit, November 6th, 1883, Albert W. Booker was the owner of the timber in question, and that on that day the appellant paid him therefor \$927.00 in cash, and he executed to the appellant the following writing:

“CRAWFORDSVILLE, IND., Nov. 6, 1883.

“This certifies that Albert Booker has this day sold to Simeon D. Hostetter one hundred and six oak trees (106) to be taken from the farm known as the William Booker farm, in Franklin township, Montgomery county, Indiana; choice of said trees by said Hostetter. Consideration, nine hun-

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Hostetter v. Auman.

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dred and twenty-seven dollars, cash paid in hand, receipt hereby acknowledged.

“ ATTEST :

ALBERT W. BOOKER.”

The third reason for a new trial is : “ That the court erred in admitting, over the objection of the plaintiff, the evidence of Albert W. Booker, which evidence was of and concerning the negotiations for the purchase of a certain one hundred and six oak trees by the defendant of Albert W. Booker.”

The written contract above set out was handed to said witness, and he stated that he executed it, and that contemporaneously therewith the amount of money named was paid to him. Counsel for the appellee then propounded to him the following question : “ State what negotiations you had in reference to the sale of timber, and with whom ; and state to whom you sold it, whether to this plaintiff or to the defendant, Lafayette Auman.” The appellant objected to the question, and stated the grounds of his objection as follows : “ 1. That all negotiations in reference to the sale of the timber were merged in the written contract of sale made and executed by the witness to the plaintiff, and it is the best and only evidence of what that contract was, or of the fact as to whom the sale was made. 2. That the contract for the sale of growing timber is a contract for the sale of real estate, and to be binding must be in writing ; and that any parol contract for the sale of the timber, made prior to the written contract, would be within the statute of frauds and void, and could not affect the written contract between Booker and the plaintiff.” These objections were overruled by the court and the proper exception saved.

In answer to the question the witness testified as follows : “ I had no negotiations with the plaintiff in reference to the sale of the timber ; all of the negotiations in reference to the sale of the timber were made with Lafayette Auman ; I was offering it for sale to the highest bidder, and his bid was the best, and I sold to him ; he had to come to town to

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Hostetter v. Auman.

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get the money from Hostetter for the timber; Mr. Hostetter paid me the money; I understood he was paying it for Auman; I signed the written instrument dated November 6th, 1883, which has been read in evidence, but understood that it was simply a receipt for the money paid me by Hostetter for Auman."

The fourth reason for a new trial is: "That the court erred in admitting in evidence, over the objection of the plaintiff, the evidence of Lafayette Auman, which evidence was of and concerning the negotiations for the purchase of a certain one hundred oak trees by the said Lafayette Auman."

The witness testified that he was the defendant in the action; knew Albert Booker, and was acquainted with the timber in question; whereupon his counsel propounded to him the following question:

"State all about the negotiations which led up to the sale of the timber, and whether you purchased the timber and what you paid for it."

To this question the appellant objected, and stated the grounds of his objection as follows:

"1. That all the negotiations for the sale of the timber are merged in the written contract made by Albert Booker with plaintiff, and that the written contract is the best evidence of what the contract was, and of the fact as to whom the sale was made, and parol evidence can not be given to vary or contradict it. 2. That the contract for the sale of growing timber is a contract for the sale of real estate, and to be binding must be in writing; that any parol contract made by witness with Albert Booker for the timber would be within the statute of frauds and void, and could not in any manner affect the written contract between the plaintiff and the same party for the timber."

The court overruled the objections and the appellant reserved the proper exception.

The witness, in answer to the question, testified as follows: "I went to see Booker and made a bid for the timber, which

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Hostetter v. Auman.

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was accepted ; I bid nine hundred and twenty-seven dollars ; I then went to see the plaintiff about getting the money ; I and Allen Sunman went together to see him ; saw him at his house ; I agreed to furnish the timber and he was to furnish the money to pay for it, and I was to work it into staves and deliver them to him on the side-track of the railroad at Darlington ; after he received back at these prices the nine hundred and twenty-seven dollars paid for the timber, the residue was to be divided ; Hostetter also agreed to advance some money to pay hands to assist in getting out the timber ; there was not a word said about a written contract, nor about my turning the contract for the timber over to Hostetter. After this agreement was made, Hostetter came to Darlington and met me and Booker and asked : ' Shall I pay the money to you or Booker ? ' and I replied, ' It makes no difference so Booker gets his money. ' Mr. Booker came to Crawfordsville with Mr. Hostetter ; I did not go with them ; I was not there when the written agreement signed by Albert Booker was executed ; I knew nothing about it till afterwards. "

If there is one question better settled than another by numerous decisions of this court, that question is, that when a written contract is executed all previous negotiations and understandings are merged in the writing, and parol evidence can not be introduced to vary or control its legal effect. The writing which the witness Booker executed to the appellant evidenced a sale of one hundred and six oak trees on a certain tract of land, by the said witness to the appellant ; it stated the consideration and its payment. It was not competent to prove by the witness his understanding of the legal effect of the writing, whether he understood it to be a receipt or a contract, nor to whom he supposed he was selling the timber ; nor was it competent to prove by the appellee, either to contradict the writing or to control its legal effect, former negotiations which he had had with the appellant or with Booker ; and in overruling the objections to the questions put to them and allowing

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them to testify in answer thereto, the rulings of the court were erroneous.

The fifth reason assigned for a new trial raises a similar question to the third and fourth reasons, and nothing need be said as to it.

The first reason assigned in the motion for a new trial is, in substance, that the court erred in refusing to give instructions 1, 2 and 3 requested by the appellant. These instructions are as follows :

“ 1. A contract for the sale of growing timber is a contract for the sale of an interest in land, and must be in writing in order to bind either party.

“ 2. If you find from the evidence that the plaintiff, Simeon D. Hostetter, on the 6th day of November, 1883, by the written contract with Albert Booker, introduced in evidence, purchased the timber trees in controversy and paid for the same with his own money, and that said written contract was made and executed to said Hostetter for his own benefit and protection, then the trees purchased became the property of said Hostetter, by virtue of said written agreement.

“ 3. A verbal contract for the sale of green and growing timber, unaccompanied by the payment of a portion of the purchase-money, or by the possession of the timber sold, is void, and can not be enforced by either of the parties.”

If there was any fault in these instructions, they stated the law too favorably for the appellee, and the refusal to give them was error. *Owens v. Lewis*, 46 Ind. 488; *Selch v. Jones*, 28 Ind. 255, and cases cited therein.

The transaction between Booker and the appellant passed the title in the timber to the appellant absolutely.

The previous negotiations which the appellee had with Booker gave to him no claim upon the timber, nor did the arrangement or understanding which he had with the appellant do so. Having paid no money, and not having acquired possession pursuant to any parol contract, and holding no



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Simons, Administrator, *et al.* v. Busby.

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written contract for the timber, we can imagine no possible interest or right that he could have therein.

The second reason assigned for a new trial is, in substance, that the court erred in the instructions given to the jury.

For the reasons given in this opinion, all of the instructions are erroneous.

It is not necessary to consider the sixth and seventh reasons assigned for a new trial.

The judgment is reversed, with costs.

Filed March 9, 1889; petition for a rehearing overruled May 10, 1889.

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No. 14,738.

119	13
153	7

SIMONS, ADMINISTRATOR, ET AL. v. BUSBY.

**PLEADING.**—*Death of Party.*—*Amendment of Complaint.*—*Curable Defect.*—

Where, upon the death of the defendant, the complaint is not amended so as to aver his death and the appointment of an administrator, but the administrator appears and answers, the defect in the pleading is a mere informality and not, under section 658, R. S. 1881, available for the reversal of the judgment.

**SEDUCTION.**—*Publication of Wrong.*—*Aggravation of Damages.*—In an action by an unmarried female for her own seduction it is proper to allege and prove, in aggravation of the damages, the publicity given by the defendant to the seduction.

**SAME.**—*Complaint.*—*Recovery of General Damages.*—Where the facts constituting the seduction are set out in the complaint, together with averments that the plaintiff was damaged by reason of the publicity given by the defendant to the wrong "and was otherwise injured," the plaintiff is entitled to general damages.

**SAME.**—*Keeping Company with Other Women.*—*Irrelevant Evidence.*—The fact that the defendant kept company with other unmarried women during the time when he was visiting the plaintiff and when it is alleged he

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Simons, Administrator, *et al.* v. Busby.

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accomplished her seduction, is not admissible in evidence in an action to recover for the seduction.

**SAME.**—*Instruction to Jury.—Declarations of Defendant.*—Where there is evidence to which it is applicable, an instruction that the jury, in determining whether the preponderance of the evidence is with the plaintiff, may consider any statements made by the defendant in regard to the manner in which he accomplished the seduction and the conduct of the plaintiff at the time of the intercourse, is proper.

**SAME.**—*Fraudulent Conveyance.—Sale of Real Estate.—Application of Proceeds.*—In an action for seduction and to set aside an alleged fraudulent conveyance of real estate by the deceased defendant, the court has authority to order the sale of the real estate by his administrator, who has appeared as a party, but it may not direct the proceeds to be applied in payment of the judgment to the exclusion of other creditors.

From the Greene Circuit Court,

*A. G. Cavins, E. H. C. Cavins, W. L. Cavins, W. W. Moffett*  
and *C. E. Davis*, for appellants.

*E. Short* and *J. S. Bays*, for appellee.

**OLDS, J.**—This action was commenced by the appellee against John N. Simons and James S. Simons, charging John N. Simons with the seduction of the appellee, and to set aside a conveyance of real estate made by John N. Simons to James S. Simons. Pending the action, John N. Simons died, his death was suggested, and the appellant Samuel Simons, administrator of the estate of said John N. Simons, appeared to the action and filed a demurrer to the complaint, which was overruled, and he filed an answer. The cause was submitted, trial had, resulting in a verdict in favor of appellee for \$500 and an allowance for said amount, and the court rendered judgment setting aside the conveyance of the real estate by John N. to James S. Simons. The court also found that the land was of the value of \$1,200, and that there were no assets belonging to said estate, except the real estate, and ordered the administrator to sell the real estate subject to a mortgage thereon, ordered the administrator to give bond in the sum of \$2,400, and that he pay from the proceeds of such sale: First. The costs of administration, including

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Simons, Administrator, *et al.* v. Busby.

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costs of this suit. Second. The expenses of last sickness and funeral expenses. Third. The judgment in this cause in favor of appellee.

The first alleged error discussed is, that the court erred in overruling the demurrer of the appellant Samuel Simons, administrator, to the complaint. The demurrer was for the cause, that the complaint does not state facts sufficient to constitute a cause of action against said Samuel Simons, administrator. The first objection urged is, that upon the death of John N. the complaint was not amended so as to aver the death of John N. and the appointment of Samuel as administrator. This defect in the complaint is a mere informality, and the defendant having appeared and answered the complaint, and the cause appearing to have been fairly tried, it is not such an error as will reverse the judgment, and it is such an imperfection as is cured by section 658, R. S. 1881.

The next objection urged to the complaint is, that it does not state facts sufficient to constitute a cause of action for seduction. The complaint alleges that the plaintiff is an unmarried female, and that the defendant John N. Simons, on the 25th day of April, 1886, and other days and times since said day, and before the bringing of this action, had carnal intercourse with the plaintiff, who was, previous to and until said acts complained of, virtuous and chaste and of good character for chastity, and had never had sexual intercourse with any man; that as a means of accomplishing said seduction the defendant had regularly waited upon plaintiff as a suitor, giving her kind and affectionate treatment; that he also falsely, fraudulently and corruptly represented to her that he desired to marry her, and did promise to marry her, and she consented to marry him before said acts of sexual intercourse; that by his kind attentions to her he gained her affections and confidence, and she, believing that the defendant intended to marry her, and having full confidence in him and great love for him, consented to said sexual intercourse; that said de-

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fendant, as soon as he accomplished his malicious purpose to debauch said plaintiff, deserted her, refused to marry her and publicly published the fact that he had had sexual intercourse with her. It is further averred that, at the time of said seduction, she was of good social standing and respectability; that on account of said seduction being made known by defendant, her fair name has been destroyed and her associates have forsaken her and she has suffered great agony of mind, and was otherwise injured, to her damage \$2,000.

It is contended that the only damages alleged are such as resulted by reason of the publicity of the seduction by the said John N. Simons, and that the plaintiff can not recover damages for the publicity; that the only liability for the publishing of the seduction would be in an action for slander. In the case of *Haymond v. Saucer*, 84 Ind. 3, it was held that, in an action for breach of promise to marry and for seduction, if the defendant wantonly, with intent to injure the plaintiff, and without reasonable belief that he will be able to prove it, allege in his answer that the plaintiff is unchaste and has had illicit intercourse with other men, it may be considered in aggravation of damages. In the case of *Wilson v. Shepler*, 86 Ind. 275, this court said: "But, besides the loss of time and actual expenses, the injured party is entitled to compensation for the disgrace and personal injury which she suffers, for which it is evident there can be no definite money standard or measure." And the statute provides that "Any unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein such damages as may be assessed in her favor." Section 263, R. S. 1881. In an action by the parent for the seduction of the daughter, damages are recoverable for the wounded feelings and dishonor which the parent sustains. 2 Sedgwick Damages (7th ed.), p. 513.

The damages for personal injury, wounded feelings and dishonor suffered by reason of the seduction are recoverable by a female in an action under our statutes for her own

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seduction, and the extent and amount of the damages must depend to some extent on the publicity given to the outrage and injury sustained by her. Such damages can not, as contended by counsel, be recovered in an action for slander, for such words spoken of her would not be false. It is therefore proper, in an action for seduction, to allege and prove the publicity given to the wrong by the defendant; and it is proper to consider the same in the assessment of the damages sustained by the injured party, and the complaint would be good if construed as contended for by the appellants. But it is averred in the complaint that the plaintiff "was otherwise injured," and the averments in the complaint charging the seduction entitled the plaintiff to general damages; and the allegations in regard to the publicity given to it by the defendant, and the damages resulting therefrom, were in aggravation of the damages. There was no error in the ruling of the court on the demurrer.

The next alleged error discussed is the exclusion of testimony. The appellee introduced testimony to show that said John N. Simons kept company with appellee at and before and after the seduction, and appellants offered to prove by a witness that during the same time said John N. kept company with appellee he also kept company with other unmarried women. Objection was made and sustained, and the testimony was excluded. The ruling of the court was proper. The question as to whether John N. Simons kept company with other unmarried women or not was not an issue in the case, and if it had any bearing upon whether he seduced the appellee or not, it is so remote that it can have no relevancy and was properly excluded.

One Moreland testified as a witness for appellee, and in the course of his cross-examination he was asked as to whether he had not drunk with one Fuller, a witness on behalf of the appellants, and he stated he had, upon two occasions, and

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he was asked if he had not done so a third time at a particular time and place, and he stated that he did not; and the defendant Samuel Simons offered to testify on his own behalf, for the purpose of impeaching Moreland and showing Moreland's interest in the cause, that he had called said Fuller to take a drink at the time when Moreland stated he had not, and objection was made and his testimony was excluded. This was an immaterial matter. Moreland admitted having treated Fuller and drunk with him, and the only controversy was as to whether it was one particular time or another, and the evidence of Simons was properly excluded.

It is contended that the court erred in giving instruction number one; that it is ambiguous and assumes that the deceased claimed that he seduced the appellee. The particular portion of the instruction objected to is as follows:

"In determining whether the preponderance of the evidence is with the plaintiff, you will take into consideration any statements, if any have been proven, that may have been made by the deceased in regard to the manner in which he claimed he had accomplished the seduction, and the action of the plaintiff at the time of the intercourse."

We do not think this instruction subject to the objection urged by counsel. It does not assume that the deceased claimed he had seduced the plaintiff, but that the jury might consider any statements which it had been proven that John N. made about having seduced her, and the manner in which he accomplished it, and how she acted at the time of the intercourse. The instruction was proper, under the evidence, as a witness had testified "that John N. had told him how he had accomplished the wrong by coaxing, persuading and promising to marry her, and that she must submit to intercourse with him if she desired to marry him."

It is further contended that the court erred in modifying instruction number two, asked for by appellants. Appellants asked the court to charge the jury that "they could not consider any damages which may have arisen from the fact the

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deceased told about the intimacy between him and the plaintiff." There was no error in modifying this instruction; it was not proper to be given as the law of the case, and the instruction as modified and given stated the law too favorably to the defendant.

It is contended that the damages are excessive, that the verdict is not sustained by sufficient evidence, and is contrary to law. We have carefully read the evidence and it fully sustains the verdict, and while there is some evidence detrimental to the appellee's character, yet the jury was clearly justified in finding in her favor, as they did, and having so found the damages are not excessive.

It is further contended that the court erred in ordering the sale of the real estate. It has been held in an action of this same character, for setting aside a fraudulent conveyance of real estate, that the court had authority to order the sale of the real estate by the administrator, but had no authority to order the proceeds to be applied in payment of the judgment to the exclusion of other creditors. *Bottorff v. Covert*, 90 Ind. 508. The judgment, in so far as it orders the sale of the real estate, is proper, but the proceeds must be applied as required by statute. There was no motion made by the appellants to modify the judgment in this respect.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs, and five per cent. damages.

Filed May 10, 1889.

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Maxwell v. The Board of Commissioners of Fulton County.

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No. 13,538.

**MAXWELL v. THE BOARD OF COMMISSIONERS OF FULTON COUNTY.**

**COUNTY COMMISSIONERS.**—*Judgment of.*—The judgment of the board of county commissioners, upon a matter of which it has jurisdiction, is as binding upon the parties as the judgment of any other court.

**SAME.**—*Appeal.*—*Res Judicata.*—Where a claim, filed before the board of county commissioners for damages sustained by reason of a defective bridge, was rejected in 1883, the only remedy of the claimant, under the law then in force, was by appeal from the judgment.

**SAME.**—*Presentation of Claims.*—*Act of 1885.*—*Retrospective Effect.*—Statutes must be construed as having a prospective operation, unless a different intention is apparent; as no such intention is shown by the act of 1885 (Acts of 1885, p. 80), relating to the presentation of claims against counties, it can not be given a retrospective effect.

**SAME.**—*Right of Trial by Jury.*—*Constitutional Guaranty.*—*Onerous Condition.*—The act of March 29th, 1879, requiring all claims against counties to be filed and adjudicated before the board of commissioners, is not in conflict with the constitutional provision guaranteeing the right to a trial by jury because it requires the claimant, upon the rejection of his claim, to give bond for costs in order to appeal to the circuit court, where a trial by jury may be had.

From the Fulton Circuit Court.

*M. L. Essick, G. W. Holman, J. Morris, R. C. Bell and S. L. Morris*, for appellant.

*J. Rowley and M. A. Baker*, for appellee.

**COFFEY, J.**—This cause was commenced and tried in the Fulton Circuit Court, resulting in a judgment for the appellant, from which an appeal was taken to this court, where the judgment was reversed. See *Board, etc., v. Maxwell*, 101 Ind. 268.

After the cause was remanded to the court below it was dismissed by the appellant, and on the 17th day of March, 1886, he commenced this action.

The complaint charges that while driving over one of de-

119	20
121	391
119	20
137	152

119	20
141	72
142	347
119	20
147	634

119	20
152	503

119	20
162	503



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fendant's bridges, with a portable engine, on the 23d day of July, 1883, said bridge broke down, precipitating the wagon, team and said engine, the property of the plaintiff, into the stream over which said bridge was constructed, whereby the same was greatly injured, to the plaintiff's damage ; that said bridge was out of repair, and defendant, having notice thereof, negligently failed to repair the same, by reason of which said injury occurred without the fault or negligence of the plaintiff.

The defendant filed an answer in three paragraphs to this complaint. The first and second were subsequently withdrawn, leaving the third paragraph as the only answer on file. This answer alleges that the identical claim set out in the complaint was filed with the auditor of Fulton county at the September term, 1883, of the board of commissioners of said county. That said claim was tried before said board of commissioners, and was rejected and disallowed by them, which judgment of rejection and disallowance still remains of record unappealed from.

The plaintiff filed a demurrer to this answer, alleging as cause that the same did not state facts sufficient to constitute a defence to the plaintiff's complaint.

The demurrer was overruled by the court, to which ruling the plaintiff excepted, and the defendant had judgment for costs. From this judgment the plaintiff appeals to this court, and assigns for error the overruling of his demurrer to said answer.

It is settled in this State that the board of commissioners is a court of limited jurisdiction, and that in passing upon claims presented to it it acts in a judicial capacity. *Board, etc., v. Gregory*, 42 Ind. 32 ; *State, ex rel., v. Board, etc.*, 101 Ind. 69.

Its adjudications in matters over which it has jurisdiction are as binding upon the parties as the adjudications of any other court. The board of commissioners of Fulton county had exclusive jurisdiction over this claim, and its adjudi-

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cation upon it was, at the time it was made, binding upon all the parties. *Board, etc., v. Maxwell, supra* ; *State, ex rel., v. Board, etc., supra*.

Section 5771, R. S. 1881, was repealed by an act regulating the presentation of claims against counties in the State of Indiana before the board of county commissioners, and the adjudication of the same, approved March 29th, 1879 ; so that at the time the board of commissioners of Fulton county entered its judgment disallowing this claim, the only remedy of the appellant, if he felt himself aggrieved, was by appeal to the circuit court.

The appellant argues that, conceding this to be true, still, under the provisions of section 3 of the act of 1885, Acts of 1885, page 80, he may maintain this action. The contention is that this act has a retrospective operation, and hence that it applies to this case.

It may be conceded that many acts of the Legislature have a retrospective operation, but they are generally acts legalizing past proceedings, acts of relief, of pardon, or of indemnity ; acts which mitigate the malignity of an offence, or mollify the rigor of the criminal law. Statutes must be construed as having a prospective operation, unless a different intention is apparent. *Hopkins v. Jones*, 22 Ind. 310 ; *Pritchard v. Spencer*, 2 Ind. 486 ; *Flinn v. Parsons*, 60 Ind. 573.

There is nothing in the act in question indicating that the Legislature intended that it should have a retrospective operation. We think it applies to claims filed and adjudicated after its passage, and to no others.

The court did not err in overruling the demurrer of the appellant to the answer of the appellee.

Judgment affirmed.

Filed Jan. 23, 1889.

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ON PETITION FOR A REHEARING.

COFFEY, J.—An earnest petition for a rehearing in this cause is filed, and argued in an able brief. It is insisted that the act of the General Assembly, approved March 29th, 1879, which required all claims against the counties in this State to be filed and adjudicated before the board of commissioners, was unconstitutional, for the reason that it authorized one of the parties to the suit to pass upon the case, and deprived the other party of the right of trial by jury, unless he was able to give bond for costs and appeal to another court. It is claimed that the Legislature had no power, under our Constitution, to pass such an act.

The only limitations upon the power of the Legislature to pass laws are those imposed by the State Constitution, the Federal Constitution, and the treaties and acts of Congress adopted and enacted thereunder; and whether a statute encroaches upon the natural rights of the citizen is a legislative and not a judicial question, and the courts can not overthrow a statute upon the ground that it encroaches upon natural rights. *Hedderich v. State*, 101 Ind. 564. The power of the courts to declare a statute unconstitutional is a high one, is very cautiously exercised, and is never exercised in doubtful cases. *Robinson v. Schenck*, 102 Ind. 307.

Where the constitutionality of a statute, or of any of its provisions, is under consideration, it is and always has been the rule of this court to construe and interpret, if possible, in such manner as to sustain and not defeat the law; and it is not enough that the constitutionality of the legislation may seem to be doubtful, for in such case the benefit of the doubt must be given in favor of the constitutionality of the legislation. *Warren v. Britton*, 84 Ind. 14; *Campbell v. Dwiggin*, 83 Ind. 473; *Hays v. Tippy*, 91 Ind. 102; *McComas v. Krug*, 81 Ind. 327.

Under our State Constitution the judicial power of the State is vested in the Supreme Court and such other courts

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as may be created by the Legislature. The first Legislature to meet after the adoption of our Constitution conferred upon the several boards of commissioners in the State judicial power, and they have continued to exercise such power from that day to this. They have been clothed with original jurisdiction over a large class of cases, materially affecting the local interests of the people, since June 6th, 1853, so that they have become the most important courts of inferior jurisdiction in the State. It is true that, up to the date of the passage of the act in question, a party who submitted his claim against the county to the board of commissioners had the right, if not satisfied with its adjudication of his case, to bring his suit in a court of general jurisdiction, or to appeal his cause, as he might deem best.

In the case of *State, ex rel., v. Board, etc.*, 101 Ind. 69, it was expressly held that the act we are now considering was constitutional. It is insisted, however, that in that case the question now presented was not considered, and that, therefore, that case should not be regarded as settling the question that the statute was void for the reason that it deprived the parties of the free right of trial by jury.

In Cooley's Constitutional Limitations, page 507, the learned author, in discussing the question of the right of trial by jury, says: "The party is therefore entitled to examine into the qualifications and impartiality of jurors; and to have the proceedings public; and no conditions can be imposed upon the exercise of the right that shall impair its value and usefulness. It has been held, however, in many cases, that it is competent to deny to parties the privilege of a trial in a court of first instance, provided the right is allowed on appeal. It is undoubtedly competent to create new tribunals without common law powers, and to authorize them to proceed without a jury; but a change in the forms of action will not authorize submitting common law rights to a tribunal in which no jury is allowed. In any case, we suppose a failure to award a jury on proper demand would be

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an irregularity merely, rendering the proceedings liable to reversal, but not making them void."

In the case of *Reckner v. Warner*, 22 Ohio St. 275, it was held that a law which required a party to give bond, conditioned for the payment of costs, in order to appeal from a court where there was no right to a trial by jury to a court where such right was given, did not contravene the right of trial by jury, as guaranteed by the Constitution.

In *Hapgood v. Doherty*, 8 Gray, 373, it is said that when the right of trial by jury can be secured by giving bond and appealing from the judgment of a justice of the peace, the law conferring on the justice the right to try the cause without a jury is not unconstitutional.

In the case of *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, it was held that because the right of trial by jury may be clogged with onerous conditions, the act prescribing such conditions and terms will not be pronounced unconstitutional, unless it totally prostrates the right, or renders it wholly unavailing to the defendant for his protection.

In the case of *Stuart v. Mayor*, 7 Maryland, 500, it is said that where a law secures the trial by jury upon an appeal, it is no violation of a constitutional provision securing that right, though such law may provide for a primary trial without the intervention of a jury, because the party, if he thinks proper, may have his case tried by a jury before it is finally settled.

It was said, by PERKINS, J., in the case of *Flournoy v. City of Jeffersonville*, 17 Ind. 169, that the provision of the statute then under consideration was not unconstitutional because it deprived a party of a right without a judicial hearing and trial by jury. As in the case of *Maynes v. Moore*, 16 Ind. 116, so here, by appeal from the issue of the precept, the writ, the party can transfer his case to a judicial tribunal and demand the right of trial by jury. The remedy is not an onerous one, or a burdensome one even.

Many more authorities to the same effect might be cited,

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but we think it unnecessary to do so. Some of the authorities upon this subject draw a distinction between civil and criminal cases, and such distinction does, perhaps, exist in a majority of the States in the Union.

Our opinion is, that the act of the Legislature approved March 29th, 1879, now under consideration, is not in conflict with our Constitution in requiring a litigant to give bond for costs in order to appeal to the circuit court, where a trial may be had by jury.

Petition for rehearing overruled.

Filed May 14, 1889.

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No. 13,708.

THICKSTUN v. THE BALTIMORE AND OHIO RAILROAD  
COMPANY.

NEW TRIAL.—*Amount of Recovery.*—*Supreme Court.*—*Practice.*—No question as to the amount of the recovery is presented to the Supreme Court unless it is assigned as a cause for a new trial.

From the Clark Circuit Court.

W. B. Goodwin, for appellant.

A. Dowling, for appellee.

ELLIOTT, C. J.—The appellant recovered judgment for twenty-five dollars in the court below, and moved for a new trial, assigning as causes that the finding is contrary to law, and that it is not sustained by sufficient evidence. Under the settled rule, no question as to the amount of the recovery is presented by this motion for a new trial. *Hyatt v. Mat-*

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tingly, 68 Ind. 271; *Langohr v. Smith*, 81 Ind. 495; *McElhoes v. Dale*, 81 Ind. 67; *Millikan v. Patterson*, 91 Ind. 515; *Fort Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100. As the sole contention is that the recovery was not for a sum to which the appellant claims he was entitled, we must affirm the judgment, because the question is not presented as the law requires.

Judgment affirmed.

Filed May 10, 1889.

No. 14,699.

COLLETT v. THE BOARD OF COMMISSIONERS OF VANDERBURGH COUNTY.

**CANALS.—Abandonment.—Adjoining Owners.—Title to Canal Bed by Prescription.**—Where a canal, instituted by the State and afterwards conveyed by it to a corporation known as the Board of Trustees of the Wabash and Erie Canal, for public purposes, was abandoned as a highway, and possession was afterwards taken by abutting lot owners, who filled up the channel and rescued the property, at great expense and in good faith, from becoming a public nuisance, and retained exclusive and continuous possession for twenty years, they acquire title by prescription as against one asserting a mere private proprietary interest in the land formerly occupied by the canal.

**SAME.—Property Held for Public Use.—Statute of Limitations.**—The rule that the statute of limitations may not confer a title by prescription in property held for an unabandoned public use, as against the State, or as against one asserting the rights of the public, has no application where it is invoked as a means of securing a merely private advantage to be enjoyed by an individual.

**SAME.—Title of Canal Trustees.—Extinguishment by Adverse Possession.**—Whatever proprietary title the trustees of the Wabash and Erie Canal asserted to the canal property, distinct from the public use to which it was

119	27
121	167
119	27
128	383
119	27
136	687
119	27
146	543
119	27
154	224
155	481
119	27
162	500
119	27
166	334

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dedicated, was subject to be extinguished by adverse occupancy for the statutory period of twenty years.

**SAME.—*Estoppel.***—After abandoning the public use and renouncing its obligation to the public, neither the corporation nor its assigns can retain the fee and protect a proprietorship therein by appealing to the repudiated public use.

**SAME.—*What Constitutes Adverse Possession.***—An entry upon land with the intention of asserting ownership to it, and continuing in the visible and exclusive possession under such claim, exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission and in disregard of all other conflicting claims, is sufficient to make the possession adverse, and if continued for twenty years is equivalent to a grant.

From the Vanderburgh Circuit Court.

*J. Jump, R. N. Hudson, C. F. McNutt, J. G. McNutt and F. A. McNutt*, for appellant.

*A. Gilchrist, C. H. Butterfield, D. B. Kumler and C. A. DeBruler*, for appellee.

**MITCHELL, J.**—This is an appeal from a judgment rendered against Josephus Collett, in an action of ejectment brought by him against the board of commissioners of Vanderburgh county. The real estate in controversy consists of four lots in the city of Evansville, upon which the board of commissioners were proceeding to erect a court-house, and comprises what was formerly a portion of the property acquired by the State upon which to locate and construct a canal. Prior to 1847, under various acts of the Legislature, the State engaged in the construction, and operation to some extent, of a water-way, called the Wabash and Erie Canal, the design of which was to connect the waters of Lake Erie, at Toledo, Ohio, with those of the Ohio river, at Evansville, Indiana. After the project had been carried to partial completion by the State, for reasons which need not be repeated here provision was made by an act of the General Assembly, approved January 19th, 1846, for the organization of a corporation known as "The Board of Trustees of the Wabash and Erie Canal," to which corporation the Governor,



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on the 31st day of July, 1847, pursuant to authority conferred by the above mentioned act, conveyed all the right, title and interest of the State in and to the canal and all its appurtenances. The property in controversy was a portion of the bed of the canal, and was transferred by the above mentioned conveyance. There was evidence tending to prove that after being used for purposes of navigation until about the year 1864, the canal was abandoned as such, at and in the vicinity of Evansville and at many other places, and that in a few years later it was abandoned entirely. It extended through the city of Evansville a distance of a mile and a half, traversing a number of the public streets. Commencing in 1865, the city authorities proceeded to fill up the canal at the various street crossings, and as early as 1867 it was filled at all, or nearly all, the crossings, and the canal was thus obliterated at those points. Water collected and became stagnant in the intermediate portions, which resulted in the enactment of an ordinance by the city requiring the owners of the lots to fill up the canal, which threatened the public health. At the May term, 1866, this court decided that the State acquired only an easement or servitude in the lands over and upon which the canal was constructed, and that the fee continued in the former owners. *Edgerton v. Huff*, 26 Ind. 35. Thereupon those who seemed to be the owners of the fee of the lots in controversy proceeded to fill up the canal, completing the filling, at a cost of about \$2,000 a lot, in the year 1867. Thereafter the lots were regularly assessed for taxation against the several owners, until the year 1873, when the county of Vanderburgh acquired the title by regular conveyances from those in possession, and who had title as above.

The plaintiff claims title through a master's sale made in 1877, pursuant to a decree of the United States circuit court for the District of Indiana. In the bill of complaint upon which the decree under which the plaintiff claims was rendered, it was made to appear to the court that the corpora-

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tion to which the canal and its appendages had been transferred had become insolvent, and that the canal had been abandoned and that the property was wasting in decay. Upon the subject of the abandonment of the canal, the bill contained the following averment, viz.:

“In consequence of inadequate water supply and the destruction, several times repeated, of the reservoirs, or water-basins, on the portion of the canal south of Terre Haute, navigation was but feebly maintained on that part of the canal for about two years, and about the year 1860, in consequence of such disabilities and the railway competition drawing off the traffic, the defendant, from want of means, was forced to and did abandon all further commerce and business on that portion of the canal south of Terre Haute, and for about ten years last past the water has been drawn from the bed on that portion, and the same has not been and can not be used as a public highway, as contemplated in the said acts and by the acts of Congress aforesaid.”

The plaintiff seeks to maintain his title to the lots upon the theory that the State acquired the fee in all the lands appropriated for canal purposes, as was ruled by this court in *Water Works Co. v. Burkhart*, 41 Ind. 364, in which *Edgerton v. Huff*, *supra*, was overruled, and that through the conveyance by the Governor to the board of trustees of the Wabash and Erie Canal, and the master's sale and conveyance under the decree above mentioned, he is now invested with the title acquired by the State. This suit was commenced February 14th, 1888.

The board of commissioners gave evidence tending to prove that the county of Vanderburgh, and its grantors, had been in the open, continuous and exclusive possession of the lots in dispute, under a claim of title, during all the time since the year 1866, and the contention on its behalf is, that the county has thereby acquired an indefeasible title in fee simple by prescription.

The argument on the appellant's behalf is to the effect, that

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the board of trustees of the Wabash and Erie Canal took and held the title to the canal and its appurtenances until the master's sale, in 1877, in trust for the benefit of the people of the State, to maintain it as a public highway and means of intercommunication, that the filling up of the canal by the grantors of Vanderburgh county was nothing more than the obstruction of a public highway, which constituted a nuisance, and that no prescriptive right could arise out of an indictable offence. Hence, the argument is, the statute of limitations did not commence to run until the canal was sold in 1877. It is contended, moreover, that the evidence does not show such an open, visible, continuous and exclusive possession, under claim and color of title, as is essential to create title by prescription.

If the assumption that the canal continued, to all intents and purposes, a public highway, until it was finally dismembered and sold out in 1877, had any substantial basis to rest upon, there would be force in the contention that the statute of limitations was not effectual to confer title to those who were in the adverse occupancy of the property in question.

If the canal had remained a great public highway, then the well established principle that no one can acquire an easement or right, hostile to that of the public, in a highway by prescription might well be appealed to by the public or its representatives to defeat the prescriptive title claimed by the board of commissioners.

Title by prescription rests upon the presumption of a grant. But such a presumption will not be indulged in case a grant would have been unlawful or against public policy. Property held by the State, or by a corporation created by it for public purposes, and which is necessary to enable it to subserve the purposes for which the property was acquired, or for which the corporation was created, can not be granted away or transferred by the act of those who hold it in trust, without express authority to that end. *Louisville, etc., R. W. Co. v. Boney*, 117 Ind. 501.

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Where the rights of the public could not have been directly surrendered, they can not be lost or subverted indirectly by the laches or supineness of those who are charged with the duty of protecting them. *Sims v. City of Frankfort*, 79 Ind. 446; *Burbank v. Fay*, 65 N. Y. 57; *Pittsburgh, etc., R. R. Co. v. Reich*, 101 Ill. 157; 1 Am. & Eng. Encyclop. of Law, p. 297; 2 Dill. Munic. Corp., section 669.

The appellant is not, however, in a situation to invoke the aid of the principles above enumerated. He is not before the court representing the public, nor is he asserting a right to eject the board of commissioners of Vanderburgh county, so that he may use the property in question as a public highway. The foundation of his claim rests upon an assertion that the canal was abandoned as a public highway as early as the year 1860, and that in consequence he has acquired the title theretofore held for public purposes by the board of trustees of the Wabash and Erie Canal, as an individual, which he is now asserting for his personal benefit.

The property having been abandoned for public purposes, the State and the public having acquiesced in that abandonment for more than twenty years, it is now too late to assert a mere private proprietary interest in the land as such, against those who took and maintained actual possession in good faith and rescued the property, at great expense, from becoming a public nuisance. It is inconceivable how persons claiming to be the owners of the lots, who filled up the bed of the abandoned canal in order to abate a nuisance, were themselves guilty of creating a nuisance by obstructing a public highway.

After the corporation to which the canal and its appendages had been conveyed abandoned the canal and renounced its obligation to maintain it as a public highway, the most that it could claim was the right to hold the title to the property for its own benefit, as any other proprietor might have held it. This, by the acquiescence of the State and the public, it and its grantees have been permitted to do, and the

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property has accordingly been sold out to individuals for private purposes. From the time of the abandonment of the public use, and while the property was held by the corporation and its assigns merely as owners of the soil, the land was subject, except possibly as against the State, to all the incidents of real estate held for private purposes. One of the incidents of the ownership of land thus held is, that the statute of limitations may initiate a claim of adverse possession, which, if continued without interruption for a sufficient length of time, may extinguish the title of the real owner and invest the person in possession with an absolute title in fee. *Roots v. Beck*, 109 Ind. 472; *Riggs v. Riley*, 113 Ind. 208.

Whatever proprietary title the trustees of the Wabash and Erie canal asserted to the property in question, distinct from the public use to which it was dedicated, was subject to be extinguished by adverse occupancy during the statutory period of twenty years. *Cady v. Fitzsimmons*, 50 Conn. 209.

After abandoning the public use, and renouncing its obligation to the public, the corporation would not be permitted to retain the fee and protect its proprietorship therein by appealing to the public use which it had repudiated. What the corporation could not do can not be done by its assigns, who stand in its place. If the board of trustees had made a grant of its interest as owner of the soil, the grant would have been good as against all the world, unless questioned by the State or by its creditors.

Although the statute of limitations may not confer a title by prescription in property held for a public use, as against the State, or as against one asserting the rights of the public, that rule has no application where it is invoked as a means of securing a merely private advantage to be enjoyed by an individual. *Miller v. State*, 38 Ala. 600; *Wood Lim.*, p. 91.

Aside from the considerations already mentioned, the doctrine that the statute of limitations will not bar the rights of

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the public has its proper limitations. Thus, when a public highway has been actually, or in part, abandoned, the State may be estopped from asserting the rights of the public when to do so would involve persons, who acted in good faith, in criminal consequences, or where irreparable injury would result to valuable improvements made in ignorance of the rights of the public. *Hamilton v. State*, 106 Ind. 361 ; *Louisville, etc., R. W. Co. v. Shanklin*, 98 Ind. 573.

The statute of limitations, operating alone, may not affect the rights of the public, or of a corporation holding property for a public use, but there may be instances where the abandonment or non-user of property devoted to such a use is so pronounced and so long continued as to invite or require the intervention of persons in order to protect private interests. In such a case the application of the principles which govern estoppels *in pais* will protect private rights thus acquired. *Cheek v. City of Aurora*, 92 Ind. 107 ; '2 Dill. Munic. Corp., sec. 667. The present is eminently a case of that character.

Without recapitulating the evidence, it is only necessary to say it tended to establish a continuous, visible and exclusive occupancy of the premises by the county and its grantors sufficient to initiate and continue a claim of adverse possession for more than twenty years. Costly improvements were made by filling up the canal, thereby obliterating every trace of the public highway, and making it obvious to every one that the original proprietors were in hostile possession, exercising acts of ownership over the real estate as such.

An entry upon land with the intention of asserting ownership to it, and continuing in the visible, exclusive possession under such claim, exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission and in disregard of all other conflicting claims, is sufficient to make the possession adverse. Such a possession, continued for twenty years or more, is equivalent to a grant.

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*Roots v. Beck, supra ; Riggs v. Riley, supra ; Bell v. Longworth, 6 Ind. 273 ; Blanchard v. Moulton, 63 Me. 434 ; Clement v. Perry, 34 Iowa, 564 ; Moore v. Thompson, 69 N. C. 120.* There was no error.

The judgment is affirmed, with costs.

COFFEY, J., did not participate in the consideration of this case.

Filed May 11, 1889.

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No. 13,567.

VAN METER v. BARNETT.

**INSTRUCTIONS TO JURY.**—*Supreme Court.*—*Practice.*—Instructions which are not brought into the record either by a bill of exceptions or as provided by section 533, R. S. 1881, are not presented for consideration on appeal.

**REPLEVIN.**—*Justice of Peace.*—*Appeal.*—*Verdict.*—*Surplusage.*—A verdict in an action of replevin originating before a justice of the peace, is not contrary to law merely because the jury found the value of the property in controversy, as such finding will be treated as surplusage.

**SAME.**—*Return of Property.*—*Form of Verdict and Judgment in Circuit Court.*—Upon the trial in the circuit court of an action of replevin which originated before a justice of the peace, the verdict, if for the defendant, should be merely for the return of the property delivered by the constable to the plaintiff, and an alternative judgment that the defendant recover the value of the property, in case a return can not be had, is erroneous. R. S. 1881, sections 1550 and 1571.

From the Jackson Circuit Court.

*D. M. Alsbaugh, J. C. Lawler and W. K. Marshall, for appellant.*

*S. B. Voyles, H. Morris, J. A. Zaring and M. B. Hottel, for appellee.*

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BERKSHIRE, J.—This is an action in replevin, and originated before a justice of the peace. There are two errors assigned, as follows: 1. The court erred in overruling the motion for a new trial. 2. The court erred in overruling appellant's motion to modify the judgment.

There are several reasons assigned in the motion for a new trial. The sixth, seventh, eighth, ninth and tenth reasons relate to the instructions given and refused by the court. The instructions are not embraced in the record, either by a bill of exceptions or as provided in section 533, R. S. 1881 (see *Olds v. Deckman*, 98 Ind. 162), and are, therefore, not presented for our consideration. The first, second and fourth reasons are substantially the same. The first reason is, that the verdict is not sustained by sufficient evidence.

We have carefully considered the evidence as we find it in the record, and though of the opinion that the verdict is contrary to the weight of evidence, and sufficiently so to have justified the court below in granting a new trial, yet we can not say that there is not some evidence to support the verdict, and, therefore, can not reverse the judgment for the reason that the verdict is not sustained by the evidence.

The third reason for a new trial is, that the verdict is contrary to law. The verdict is in the following form:

"We, the jury, find for the defendant and that he is the owner and entitled to the possession of the horse described in the complaint, and five dollars damages for the detention thereof by the plaintiff, and that said horse is of the value of thirty-five dollars."

The contention of counsel for the appellant is, that as the action was instituted before a justice of the peace the jury were not authorized to find the value of the property in controversy. Conceding that counsel are correct in their position, the verdict is not contrary to law. It covers the issues in the case and entitled the appellee to a judgment for a return of the property, and as to that part of the verdict to



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which objection is made, the most that can be held is that it is surplusage and should be so treated.

It is not necessary that we go into a consideration of the question as to the legal interpretation of the words "that the verdict is contrary to law," as they are used in the statute, but content ourselves with the citation of the following authorities bearing upon the question: *Brunk v. Champ*, 88 Ind. 188; *Baldwin v. Burrows*, 95 Ind. 81; *McKeal v. Freeman*, 25 Ind. 151; *Whitney v. Lehmer*, 26 Ind. 503; *Yelton v. Slinkard*, 85 Ind. 190; *Bosseker v. Cramer*, 18 Ind. 44; *Robinson Machine Works v. Chandler*, 56 Ind. 575; *Garst v. State*, 68 Ind. 101; *Potts v. Felton*, 70 Ind. 166; *Lockwood v. Dills*, 74 Ind. 56; *Ex Parte Walls*, 73 Ind. 95; *Jones v. Baird*, 76 Ind. 164; *Buskirk Prac.* 230.

We come next to the consideration of the second assignment of error. After overruling the motion for a new trial, the court rendered a judgment for the appellant in the alternative that he recover the possession of the property in controversy, and that if a return could not be had that he recover the value of the property as fixed by the jury. After the judgment was rendered, the appellant moved the court to so modify the same that it would be a simple judgment for the return of the property. This motion the court overruled and the proper exception was reserved.

As already stated, this suit was commenced before a justice of the peace. When an appeal is taken to the circuit court from the judgment of a justice of the peace, the cause must be "there tried under the same rules and regulations prescribed for trials before justices." R. S. 1881, section 1502. The return of the verdict, motion for a new trial and the judgment are a part of the trial. Each of these steps is as much a part of the proceedings in the trial and as necessary to its final determination as are any of the previous steps taken therein. Webster's Dictionary, see "Trial"; *Rapalje & Lawrence Law Dictionary*, title "Trial"; *Jenks v. State*, 39 Ind. 1; *Galpin v. Critchlow*, 112 Mass. 339;

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*Anderson v. Pennie*, 32 Cal. 265 ; *Sturgeon v. Gray*, 96 Ind. 166 ; *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569 ; *Calvert v. State*, 91 Ind. 473 ; *Carter v. Edwards*, 16 Ind. 238 ; *Bernhamer v. Conard*, 45 Ind. 151 ; *Lane v. Kenworthy*, 43 Ind. 116 ; *Hill v. Sleeper*, 58 Ind. 221 ; *Heller v. Crawford*, 37 Ind. 279 ; *Pennsylvania Co. v. Rusie*, 95 Ind. 236 ; *Monday v. Utter*, 15 Ind. 447 ; *Beineke v. Wurgler*, 77 Ind. 468.

In the conclusion to which we have arrived, we have not overlooked the cases of *Vanschoiack v. Farrow*, 25 Ind. 310, and *Kerschner v. Cullen*, 27 Ind. 184. These cases are not in conflict with the authorities cited. They hold that the jury in the circuit court is a part of the court, and must, therefore, be selected in the manner prescribed by law for the selection of juries in that court. It might, with as much plausibility, be contended that the judge of the circuit court should conduct the trial and keep a record of the proceedings, as the justice from whom the appeal is taken is required to do, as to contend that the jury should be selected in the manner juries are selected in trials before justices.

In actions like the one under consideration, originating before justices of the peace, where, as in this case, the property has before the trial been delivered by the constable to the plaintiff, and the finding of the jury is for the defendant, the proper form of verdict, both before the justice and in the circuit court on appeal is, that the defendant did not wrongfully take (or detain, as the case may be) the property of the plaintiff, and that the defendant have return thereof. And the verdict should be followed by a judgment for the return of the property and for costs. R. S. 1881, sections 1550 and 1571.

The court erred in overruling the appellant's motion to modify the judgment.

The cause is remanded, with instructions to the court below to modify its judgment in accordance with this opinion. Judgment against the appellee for costs.

Filed March 5, 1889 ; petition for a rehearing overruled May 11, 1889.

The Louisville, New Albany and Chicago Railway Company v. Etzler.

No. 13,456.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. ETZLER.

119	39
130	40
119	39
135	539
118	39
168	479

RAILROAD.—*Injury to Animals.—Farm Crossing.—Negligence.*—In the absence of negligence on its part, a railroad company is not liable for injuring animals which enter upon its track at a private farm crossing.

SAME.—*Finding as to Character of Crossing.*—A finding that animals entered upon the railroad track “at a point where the railroad crosses a cart-way, or private way, known as McQuiddy’s Crossing,” is equivalent to a finding that the entrance was effected at a private farm crossing.

From the Jackson Circuit Court.

*G. W. Easley, G. R. Eldridge, D. M. Alsbaugh and J. C. Lawler*, for appellant.

*S. B. Voyles and H. Morris*, for appellee.

OLDS, J.—This is an action brought by the appellee against the appellant for the value of two mules which, it is alleged in the complaint, entered upon the railroad track of the appellant at a point where it was not fenced, but might have been fenced, and while upon the track were run against and over by an engine and train of cars run and operated by the employees of the appellant, and one of them was killed and the other wounded and greatly injured, and that they were each of the value of \$150.00, to the damage of the appellee in the sum of \$250.00.

The cause was tried by the court without the intervention of a jury. The court made a special finding of facts, and stated its conclusion of law thereon.

The special finding of facts and conclusion of law are as follows :

“ 1st. The plaintiff is a citizen of Washington county, Indiana, and on the 12th day of October, 1885, was the owner of the two mules described in the complaint, and that on said

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12th day of October, 1885, the defendant was and now is a railroad corporation, owning and managing the Louisville, New Albany and Chicago Railway, which railway runs in and through said county of Washington.

“ 2d. And on said day a train owned and run by said defendant upon said railway, and controlled by the employees and servants of said defendant, ran against and upon said mules, which had entered in and upon the track of said defendant's road, and killed one of said mules and so injured the other as to render it worthless.

“ 3d. That said mules entered upon the track of defendant's road at a point in said county where said railroad crosses a cart-way, or private way, known as McQuiddy's Crossing, and from said crossing passed east upon said track.

“ 4th. That there were no cattle-guards at said crossing, or any other obstacle to prevent said mules from passing from said private way to and upon said railroad track.

“ 5th. The railroad, at the point where the mules entered, runs very nearly east and west, and the mules went eastwardly after they entered upon the track.

“ 6th. That said mules, after entering upon said track, grazed along the same for some time and then ran rapidly eastwardly until they came to the cattle-guard across said railroad at Garrott's farm in said county, which cattle-guard the mules got over, and when east of said cattle-guard they were in a space enclosed by fences on each side and a cattle-guard at each end of said fences, which fences and cattle-guards enclosed said railroad. That the two cattle-guards on the Garrott land are between one quarter and a half mile apart.

“ 7th. At a point forty or forty-five rods from the west cattle-guard on Garrott's land, a train on said defendant's road overtook, struck and killed one of said mules, which mule was of the value of one hundred and twenty dollars. The train that struck said mule was going south.

“ 8th. That about forty rods from the point where the

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The Louisville, New Albany and Chicago Railway Company v. Etzler.

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first mule was struck, and at the east cattle-guard, the second mule was struck by a train of defendant and carried over the cattle-guard, which mule was crippled by such collision with the train in such manner as to render it of no value. That said mule, before said injury, was of the value of one hundred and thirty dollars.

“ 9th. That at the west cattle-guard at Garrott's there is a highway crossing said railroad, directly west of said cattle-guard. That said cattle-guards were in good repair and were connected by wing fences to the fences running on each side of said railroad between said cattle-guards.

“ 10th. That on the night said mules were killed and injured, four trains, two passenger and two freight trains, went south upon said railroad, and over the portion of the road where said mules were struck by the engine or cars; said passenger trains were about one half hour apart. That said mules escaped from the enclosure of the plaintiff the night they entered upon said track.

“ 11th. That said mule was killed and the other injured in Washington county, Indiana, were the property of the plaintiff, and at the place where said mules entered upon the track of defendant it was not, but might have been, securely fenced, and said mule was killed and the other injured by a train of cars belonging to said defendant and running upon said defendant's road.

“ And as a conclusion of law the court states upon the facts so found that said plaintiff is entitled to recover the sum of two hundred and fifty dollars.”

The appellant excepted to the conclusion of law, and assigns as error that the court erred in its conclusion of law.

By the act of the Legislature, approved April 8th, 1885, persons owning tracts of land separated by the right of way of a railroad company are authorized to construct and maintain wagon and drive-ways across such right of way of said company, and by said act railroad companies are exempted from liability for damages for animals killed or injured on

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the track of such railroad by the cars or locomotives running on the railroad, if the animals entered upon the track of such railroad at such private roadway, unless it shall be proven that such killing or injury was caused by the negligence of the servants of the company owning or operating such railroad. True, the language of the act is, "if such animal entered upon the track of such railroad through such gates," and the act provides that the land-owner shall erect and maintain substantial gates and keep them securely locked when not in use; but the erection of the gates and keeping them locked are obligations imposed on the land-owner, and for the violation of which he is liable. The absolute right to construct and maintain a private crossing is given to the land-owner, and the right of the railroad company to have exclusive control of its right of way and fences is diminished and taken away to that extent. Having no control over its right of way to prevent or control the construction and use of farm crossings, it is exempted by such act from liability for damages for animals killed or injured, if they enter upon the railroad through such private crossings, whether there are any gates erected through which the animals pass or not, unless the killing or injury is caused by the negligence of the servants of the company. These crossings are authorized to be constructed along the line of the railroad where the track may be securely fenced, and it constitutes an exception to the liability of a railroad company for stock killed upon the track where such stock entered upon the track where it was not securely fenced, and where it might have been so fenced. Of course, if there was negligence on the part of the railroad company or its employees in properly keeping in good repair any portion of the fence it was the duty of the company to keep in repair, and by reason of such negligence the animals entered upon the track through or across such defective fence, the company would be liable. We have said this much on the question of the statute, for the reason that it is contended by counsel for ap-

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pellee that, unless it affirmatively appears that the animals entered upon the track through gates at the private crossing, the company is liable. It is contended that it does not so appear by the special findings in this case, and that the special findings in this case do not show an entry of the animals through such a crossing as is contemplated by the statute of 1885.

It appears from the special findings of facts in this case, that the mules entered upon the track at a point where the railroad crosses "a cart-way or private way, known as McQuiddy's crossing." The construction we place upon this finding is, that it was at a private farm crossing, such as is authorized by the statute, where the mules entered upon the track. No other crossings are permitted by law, except public streets and highways. The crossing is not designated in the finding by the same term used in the statute. The statute uses the words "wagon and drive-ways." A "private way or cart-way" means, as we think, a "drive-way," and the special findings do not show that the servants of the company were guilty of any negligence which caused or contributed to the killing of the mules. *Hunt v. Lake Shore, etc., R. W. Co.*, 112 Ind. 69.

We are, therefore, of the opinion that the facts found by the court did not entitle the appellee to recover, and we might add further, that, independently of the question of the mules entering upon the track at a private crossing, the facts found show that after the mules entered upon the track, they, of their own volition, strayed along the track until they came upon a public highway where the railroad company was not required to fence its track, and from such highway the mules, without being driven by approaching locomotives or cars, or by reason of any fault on the part of the railroad company or its employees, of their own accord entered upon the track where it was properly and securely fenced, crossing over a proper cattle-guard, which was at the time in good condition. To say the least, these facts ren-

der the appellee's right to recover very doubtful ; but having to reverse the judgment on the other questions, it is not necessary to pass upon this.

The only exception reserved and error assigned is as to the conclusion of law stated by the court, and it would seem that the statute exempting the appellant from liability was not considered in the trial of the cause. For that reason the facts may not have been so fully stated by the court as they would have been had the court at the time had in mind the statute, and the findings of fact may convey a different idea to this court than was intended by the court trying the cause. We are of the opinion that justice will be best subserved by ordering a new trial in this cause. *Buchanan v. Milligan*, 108 Ind. 433.

The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to set aside the judgment and grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed May 11, 1889.



No. 13,395.

PETERS ET AL. v. GUTHRIE ET AL.

PLEADING.—*Complaint.—Theory.—Must be Good as to all Plaintiffs.*—A complaint must proceed upon some definite theory, and must state facts sufficient to constitute a good cause of action in favor of all who join as plaintiffs, upon the theory on which it proceeds.

SHERIFF'S SALE.—*Invalidity of.—Setting Aside Satisfaction of Judgment.—Re-Sale.—Parties.—Complaint.*—The grantee of a purchaser at a sheriff's sale, which is void because of a failure to observe the appraisement law, has no cause of action, as against those claiming the real estate, to set aside

119	44
121	508
123	285
119	44
126	476
119	44
131	417
119	44
137	284
119	44
140	138
119	44
150	314
150	348
152	575



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*Peters et al. v. Guthrie et al.*

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the satisfaction of the judgment and subject the property to re-sale or to redeem from an alleged illegal tax sale, and a joint complaint for that purpose by him and his grantor, who is the owner of the judgment, is bad.

From the Cass Circuit Court.

*G. E. Ross*, for appellants.

*D. P. Baldwin*, for appellees.

MITCHELL, J.—This was a suit by Alexander S. Guthrie and Henry J. Banta against Abraham Peters, Catharine Peters and Margaret Sheehan, to set aside the satisfaction of a judgment and for leave to re-sell certain real estate in pursuance of a decree of foreclosure.

The complaint shows that Guthrie had become the owner, by assignment, of a judgment and decree foreclosing a mortgage which had theretofore been executed upon three lots in the city of Logansport, owned by Catharine and Abraham Peters. The lots were sold, pursuant to the decree, to Guthrie, who bid therefor the amount of the judgment and costs, which were duly satisfied and cancelled of record, the purchaser receiving a sheriff's deed in due course. Afterwards Guthrie sold and conveyed one of the lots to Henry J. Banta. It was subsequently discovered that the foreclosure sale was invalid and void, because the judgment and decree were subject to the valuation and appraisement laws, and the sale had been made without first causing the land to be appraised according to the statute in such cases made and provided. It also appeared that Margaret Sheehan had obtained and was then holding a tax deed covering the three lots, which deed was alleged to be invalid and void for reasons stated in the complaint. Mrs. Sheehan and the Peters remained in possession of the property. The plaintiffs offered to redeem from the tax sale and asked to have Mrs. Sheehan's deed avoided.

The question presented upon the complaint is, whether or not the facts stated show a good cause of action in favor of Guthrie and Banta.

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*Peters et al. v. Guthrie et al.*

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It is settled beyond controversy that a complaint must proceed upon some definite theory, and that it must state facts sufficient to constitute a good cause of action in favor of all those who join as plaintiffs, upon the theory on which it proceeds. *Brown v. Critchell*, 110 Ind. 31; *Chicago, etc., R. R. Co. v. Bills*, 104 Ind. 13; *Hyatt v. Cochran*, 85 Ind. 231, and cases cited; *Faulkner v. Brigel*, 101 Ind. 329; *Home Ins. Co. v. Gilman*, 112 Ind. 7.

A complaint must be good as to all the plaintiffs, or it is not sufficient as to any. *Brumfield v. Drook*, 101 Ind. 190; *Holzman v. Hibben*, 100 Ind. 338. An exception to this rule occurs when a husband, as such, joins as plaintiff in an action brought by the wife for injuries to her person or character. *Roller v. Blair*, 96 Ind. 203; *Ohio, etc., R. W. Co. v. Cosby*, 107 Ind. 32.

The complaint in the case under consideration proceeds upon the theory that the sale of the three lots covered by the decree, which were owned by Guthrie, was void because the sheriff failed to have the land appraised according to the requirements of the statute (*Fletcher v. Holmes*, 25 Ind. 458), and that hence the cancellation and satisfaction resulting from the sale, and theretofore entered, ought to be set aside. Adopting the plaintiffs' theory, the most that can be said of the complaint is, that it shows a right of action in Guthrie to have his decree and judgment reinstated to the position it occupied before the abortive sale, and for an order authorizing him to re-sell the land. Upon the theory of the complaint, neither Guthrie nor Banta had any title or ownership in the lots. Guthrie simply had an unsatisfied decree of foreclosure. Banta had taken a conveyance of one of the lots from Guthrie, who confessedly had nothing to convey, his title upon his theory being void. The conveyance by Guthrie of one of the lots to Banta invested the latter with no interest whatever in the decree and judgment, which was owned entirely by the former, and as the decree was the only foundation upon which either could build a right of action

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against those claiming the property, it results that Banta was entirely destitute of anything upon which to base an action, either in respect to the cancellation prayed for, or the right to redeem from the alleged illegal tax sales. The complaint was, therefore, insufficient on demurrer, for the reason that it stated no cause of action of any kind in favor of Banta.

Judgment reversed, with costs.

Filed March 14, 1889; petition for a rehearing overruled May 11, 1889.

119	47
119	395
119	47
180	428
119	47
149	191

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No. 8813.

THE LAWRENCEBURGH FURNITURE MANUFACTURING  
COMPANY ET AL. v. HINKE.

**PLEADING.**—*Motion to Strike Out Parts of.*—*Practice.*—There is no available error in overruling a motion to strike out parts of a complaint.

**SAME.**—*Complaint.*—*Negligence.*—A complaint charging the defendant with negligence, whereby the plaintiff, without his fault, sustained great bodily injuries, is good on demurrer.

**SAME.**—*Answer.*—*Demurrer.*—*Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of answer where the same facts are provable under another paragraph, or where the paragraph to which the demurrer is sustained is merely a special denial.

**SUPREME COURT.**—*Transcript.*—*Omission of Evidence.*—*New Trial.*—*Presumption.*—Where the record shows upon its face that it does not contain all of the evidence, it will be presumed that the action of the trial court in overruling a motion for a new trial was right, where the causes assigned depend upon the evidence.

From the Dearborn Circuit Court.

*W. S. Holman, J. Schwartz and W. H. Bainbridge*, for appellants.

*R. E. Slater and F. Adkinson*, for appellee.

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BERKSHIRE, J.—The complaint charges the appellants with negligence, whereby the appellee was greatly injured in his person, and negatives contributory negligence on his part. The appellants demurred to the complaint, which demurrer the court overruled, and they excepted to the ruling of the court. The appellants also moved to strike out and reject certain parts of the complaint, which motion the court overruled, and they excepted.

The appellants filed separate answers to the complaint, the furniture company in two paragraphs, and the other appellant in three paragraphs. The first paragraph of each answer was the general denial. To the other paragraphs the appellee demurred, the court sustained the demurrers and the appellants reserved exceptions.

The issues joined were afterwards submitted to a jury for trial, a verdict returned for the appellee, and, over a motion for a new trial, the court rendered judgment upon the verdict.

The errors assigned are, (1) the court erred in overruling the motion to strike out parts of the complaint, (2) in overruling the demurrers to the complaint, (3) in sustaining the demurrers to the several paragraphs of answer, and (4) in overruling the motion for a new trial.

There was no available error in overruling the motion to strike out parts of the complaint.

The facts alleged in the complaint imputed negligence to the appellants, whereby the appellee sustained great bodily injury, and the complaint contained the negative allegation as to negligence on his part. The complaint was clearly good, and the demurrers rightly overruled.

All the facts alleged in the paragraphs of answer to which the demurrers were sustained were provable under the general denial; in fact, the paragraphs were mere special denials, and the court committed no available error by sustaining the demurrers thereto.

The reasons for a new trial all depend upon the evidence that was given upon the trial. In looking over the record

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Evans v. Schafer et al.

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we find that it shows upon its face that there was evidence given on the trial which it does not contain. We must, therefore, treat the record as not containing the evidence, and when we do this, we must presume in favor of the action of the court below in overruling the motion for a new trial. *Collins v. Collins*, 100 Ind. 266; *Thames, etc., Co. v. Beville*, 100 Ind. 309; *Beatty v. O'Connor*, 106 Ind. 81; *Lyon v. Davis*, 111 Ind. 384; *Kleyla v. State, ex rel.*, 112 Ind. 146; *Mattinger v. Lake Shore, etc., R. W. Co.*, 117 Ind. 136.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed May 11, 1889.

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No. 13,714.

EVANS v. SCHAFFER ET AL.

**PLEADING.—Complaint.—Defect of Parties.—Demurrer.**—A demurrer for a defect of parties does not question the sufficiency of the complaint to state a cause of action in favor of all the persons who are joined as plaintiffs.

**REAL ESTATE.—Action to Recover.—Complaint.—Judgment for Possession.—Absence of Prayer for.**—A judgment may be rendered for the possession of real estate, where the facts pleaded and proved entitle the plaintiff to that relief, although the complaint contains no specific prayer for possession.

From the Clark Circuit Court.

*D. C. Anthony* and *M. Clegg*, for appellant.

*J. H. Stotsenburg* and *E. B. Stotsenburg*, for appellees.

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OLDS, J.—This action was commenced by Henry Schafer, in his lifetime, against Sargent W. Evans, the appellant, alleging that the said Henry Schafer, plaintiff, was the owner in fee simple and entitled to the possession of certain real estate described in the complaint, and that the defendant held the possession of the same without right, and for six years last past had unlawfully kept the plaintiff out of possession thereof, to plaintiff's damage \$600, which sum is still due and unpaid. Prayer for judgment for \$600, and all other proper relief.

During the pendency of the suit, the plaintiff, Henry Schafer, died, and Elizabeth Schafer, David Schafer, George Schafer, and David Schafer, as executor of the last will and testament of said Henry Schafer, deceased, were substituted as parties plaintiffs.

The appellant, the defendant below, demurred to the complaint for cause that "there is a defect in parties plaintiffs; that the executor of the will, and not the heirs of Henry Schafer, is the proper plaintiff."

It will be observed that the executor of the will of Henry Schafer is one of the parties substituted as plaintiff.

It is urged that a complaint by several co-plaintiffs, to be sufficient, must show a good cause of action as to all the plaintiffs. That is true, when tested by a proper demurrer. A complaint in favor of several plaintiffs, to stand the test of a demurrer for want of facts sufficient to constitute a cause of action, must state a cause of action in favor of all the plaintiffs. *Brumfield v. Drook*, 101 Ind. 190; *Brown v. Critchell*, 110 Ind. 31. But the demurrer in this case is for a defect of parties, in that the executor is not a party, when he is in fact a party. The demurrer was properly overruled.

Objection is made that the judgment is rendered for the possession of the real estate, and that there is no specific prayer for the possession.

The complaint contained proper averments, which, if

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proven, entitled the plaintiffs to possession, and it also contained a general prayer for relief.

There was an appearance, trial and finding in favor of the plaintiffs "that they are the owners, and entitled to the possession of the real estate described in the complaint, and that the defendant is in the unlawful possession of the same."

There was no error in rendering judgment for the possession of the real estate. *Shattuck v. Cox*, 97 Ind. 242; *Eaton v. Burns*, 31 Ind. 390; *Lowry v. Dutton*, 28 Ind. 473; *Shotts v. Boyd*, 77 Ind. 223.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed May 8, 1889.

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No. 12,661.

SELL v. BAILEY ET AL.

**FRAUDULENT CONVEYANCE.**—*Complaint to Set Aside.*—*Averment as to Debtor's Insolvency.*—A complaint to set aside a conveyance as fraudulent as against creditors is bad if it fails to aver that the debtor, after the conveyance, had not sufficient property left to pay his debts.

From the Kosciusko Circuit Court.

*J. S. Frazer* and *W. D. Frazer*, for appellant.

*L. H. Haymond*, *L. W. Royse* and *R. B. Encell*, for appellees.

**ELLIOTT, C. J.**—The appellant's complaint assails a conveyance made by Allen L. Bailey, on the ground that it was fraudulent as against creditors. Counsel for the appellant

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119	289
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126	476
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131	470
132	58
132	549
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138	263
139	30
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164	348

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say: "The only infirmity attributed to the complaint below, and the only one anticipated here, is that it is not averred that Bailey, after the conveyance, had not sufficient property remaining to pay his debts. To meet this objection successfully, we must, of course, ask this court to overrule some of its own decisions, and this we do with the utmost confidence. The cases to which we refer are: *Pence v. Croan*, 51 Ind. 336; *Sherman v. Hogland*, 54 Ind. 578; *Evans v. Hamilton*, 56 Ind. 34; *Bentley v. Dunkle*, 57 Ind. 374; *Romine v. Romine*, 59 Ind. 346; *Deutsch v. Korsmeier*, 59 Ind. 373; *Price v. Sanders*, 60 Ind. 310; *Whitesel v. Hiney*, 62 Ind. 168; *Spaulding v. Myers*, 64 Ind. 264; *Noble v. Hines*, 72 Ind. 12; *Bruker v. Kelsey*, 72 Ind. 51. This is a formidable array of cases to be questioned in the court which decided them." Formidable as the cases arrayed by counsel are, a great many more must be added to them to complete the list. As early as the case of *Law v. Smith*, 4 Ind. 56, the rule was declared, and has since been steadily maintained. In *Phelps v. Smith*, 116 Ind. 387, we collected many cases, among them some of those cited by appellant, and we said: "The principle which our cases assert and in various phases apply is substantially that asserted in *Rice v. Perry*, 61 Me. 145, where it was said: 'A fraudulent purpose is an important element in the case, but it is not the only one; there must be superadded to it in addition to the sale, actual fraud, hindrance, or delay resulting therefrom to the creditors. The sale will be upheld unless the fraudulent purpose is actually accomplished. Thus, if, notwithstanding the sale, Whitehouse & Goodwin retained \* \* sufficient to pay the debt of Wattson & Clark, and equally open, known, and accessible to them with that sold, the sale would not be void, whatever may have been the secret purpose of the parties to it. The reason for considering the sale void in this class of cases is that creditors are damaged thereby; and when the reason is wanting the rule itself becomes inapplicable.' There is, as our cases have always affirmed, no reason for stigmatizing a convey-



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ance as fraudulent when the grantor has, at the time it is made, abundant property subject to execution out of which all his debts could be collected. Suppose, for illustration, a man to have ten thousand dollars worth of property, and to be in debt no more than five hundred dollars, and that he should make a gift to his wife of five thousand dollars. Could it be said with justice that he was guilty of fraud?" Mr. Wait, in discussing the character of the complaint, says: "This is a rule of pleading as well as of evidence. Hence a bill which contained no allegation that the debtor, at the time of the alienation, was insolvent or embarrassed, was held bad, for it is only when an inadequate amount of property remains that creditors have the legal right to complain." Wait Fraudulent Conveyances, section 143.

We adhere to our decisions, not only upon the principle of *stare decisis*, but also for the reason that they justly express the law.

Judgment affirmed.

Filed May 8, 1889.

No. 13,715.

HURLEY, ADMINISTRATOR, v. MCIVER.

**WILL.—Widow.—Election.—Waiver of Rights under the Law.**—Where a testator by his will disposes of all his property and makes provision for his widow, which she accepts, her right to the five hundred dollars allowed her by law is waived.

From the Montgomery Circuit Court.

*W. B. Herod and J. F. Harney*, for appellant.

*B. Crane and A. B. Anderson*, for appellee.

119	53
127	355
119	53
120	126
120	305
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122	302
119	53
125	505
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144	453
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151	203
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155	338
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163	309
119	53
165	482
165	482
119	53
166	359

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Hurley, Administrator, v. McIver.

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MITCHELL, J.—The record discloses that James McIver, who died in February, 1884, by his last will and testament disposed of all his estate, both real and personal. To his widow, Lucretia McIver, he gave substantially all of his household furniture and eighty acres of land in Montgomery county, to be held by her during her natural life. The remainder over in the above mentioned tract of land, together with all of his other property, real and personal, was specifically devised and bequeathed to his children. There was no provision made in the will for the payment of five hundred dollars or any other sum to his widow. The widow elected to take under the will, and accordingly occupied the real estate, and enjoyed the use of the personal property devised to her during her lifetime. Afterwards the administrator of her estate made an application to sell the real estate which had been occupied by the widow, alleging that she had never received the five hundred dollars to which she was entitled under the law, and that there was no personal property or other assets of the estate of her late husband out of which to pay the amount.

The question is presented, whether or not, since a provision was made for his widow by the last will and testament of James McIver, which she accepted with knowledge that the residue of his estate had all been specifically disposed of, without mention of the five hundred dollars allowed by law, the administrator of her estate may now compel payment of this sum notwithstanding the will.

The land which the administrator is seeking to sell was devised to the testator's son, without any suggestion that it was subject to any other encumbrance than the life estate previously devised to his mother. It is manifest, if it is now subject to be sold to pay five hundred dollars to the administrator of the widow, that the intention of the testator will be, to that extent, set aside and disregarded, and the provisions of the will thrown into confusion and disorder.

The correct rule in respect to testamentary dispositions in

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favor of a wife is, that she will be put to her election when it clearly appears from the will that the provision made for her therein was intended to take the place of that which the law makes; and the intention need not be declared in words, but may be deduced from clear and manifest implication, if the claim under the law would be plainly inconsistent with the will. Whenever it is reasonably clear that the provisions of the will were intended to be in lieu of the provision made for the widow by law, if she accepts the former she thereby waives the latter. *Wright v. Jones*, 105 Ind. 17, and cases cited; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Savage v. Burnham*, 17 N. Y. 561.

Where a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will, would defeat the manifest purpose of the testator, she will be confined to the provision made by the will, after she has effectually elected to take the benefits so provided. *Morrison v. Bowman*, 29 Cal. 337.

While a testator may not have the power to dispose of property which the law casts upon his widow, nor to deprive her of the five hundred dollars to which she is entitled by law, yet if it plainly appears that it was his purpose to do so, and the widow has accepted a testamentary provision made for her, such acceptance is a confirmation of the testamentary disposition, and waives her right under the law. As we have seen, to permit the claim now made on behalf of the estate of the widow to prevail, would operate practically to defeat the will. It can not, therefore, be allowed. This doctrine was enunciated in *Langley v. Mayhew*, 107 Ind. 198, after full and mature deliberation. It is adhered to and is decisive of the correctness of the judgment from which this appeal is prosecuted.

The judgment is affirmed, with costs.

Filed May 9, 1889.

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Barrett v. Choen *et al.*

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No. 14,177.

## BARRETT v. CHOEN ET AL.

**DECEDENTS' ESTATES.—Sale of Real Estate.—Cord-Wood and Growing Crops.**

—*Rights of Heirs.*—The purchaser of real estate at an administrator's sale acquires no title to cord-wood situate thereon, nor to growing crops sowed by the heirs of the decedent, or their tenants, after the decedent's death.

**SAME.—Reservation of Crops.—Administrator's Statement at Sale.**—A statement made by an administrator, at a sale of real estate, that the crops thereon are not reserved, can not prejudice the rights of the heirs in crops sowed by them or their tenants.

**SAME.—Parties.—Judgment.**—Persons who are made parties, as heirs, to a proceeding by an administrator to sell real estate, are only affected by the judgment in their capacity as heirs.

From the Cass Circuit Court.

*T. S. Rollins, J. M. Justice and C. E. Barrett*, for appellant.

**BERKSHIRE, J.**—The facts of the case, as found in the record, are about these: Charles G. Choen departed this life in Cass county, Indiana, on November 23d, 1883, intestate, leaving the appellees Cohens as his only legal heirs (Susan Choen being his widow), and seized of the following real estate in said county: All of that part of the southwest quarter of section 8, town. 26, range 1 east, that is south of the Southwestern Railroad, except three small pieces carved out of it. Charles G. Choen died intestate, and George W. Flannagan became his administrator. The appellees Dickerson, Donaldson and Mooney were tenants of the Choens. The administrator filed his petition to sell the said real estate to pay debts, in the Cass Circuit Court, and such proceedings were had that he obtained an order to sell the same, and on the 23d day of June, 1887, he sold it to the appellant, and on the same day, by order of the court, executed to him a deed therefor.

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Barrett v. Choen *et al.*

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At the time the deed was executed there was a large quantity of wood on the land, in the cord, and crops, consisting of corn, wheat and oats, growing on the land, the same having been sowed and planted, and were being cultivated, by the said tenants.

It appears that the Choens, without permission from the appellant, entered upon the real estate and removed therefrom a portion of the cord-wood, and were threatening to remove the remainder; that they were claiming the said growing crops, had entered upon said real estate and cut the wheat, and were threatening to remove the same, and had notified said tenants that the landlord's share of said crops should be paid to them.

The question presented for decision is, to whom do the wood and crops belong—the appellant or the appellees Choens?

The record does not inform us when the petition to sell was filed, whether before or after the crops were sowed and planted. In this state of the record, the presumption must be that the petition was filed afterwards. We are not, therefore, called on to decide what the effect would be had the petition been filed before.

Upon the death of their ancestor the title to the real estate vested at once in the heirs, subject to an equitable lien in favor of creditors in case the personal estate proved insufficient to pay the indebtedness. *Moncrief v. Moncrief*, 73 Ind. 587; *Miller v. Buell*, 92 Ind. 482.

The proceedings under the petition, including the order of sale, were, in effect, a foreclosure of the equitable lien resting upon the real estate. The order of the court was necessarily confined to the real estate; the court had no jurisdiction, in the proceedings referred to, to order the sale of personal property or to determine any question involving personal property, and had it done so its action would have been *coram non judice* and therefore void. R. S. 1881, sections 2336, 2346. The appellant could only acquire title through

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his purchase and deed, for that was all that was involved in the proceedings and order to sell. *Rogers v. Abbott*, 37 Ind. 138; *Lewis v. Owen*, 64 Ind. 446; *Angle v. Speer*, 66 Ind. 488; *Runnels v. Kaylor*, 95 Ind. 503. The crops in question were personal property. *Lindley v. Kelley*, 42 Ind. 294; *Northern v. State, ex rel.*, 1 Ind. 113; *Harvey v. Million*, 67 Ind. 90. To whom did they belong? To the Choens, necessarily; they were growing upon their lands, had been sowed, planted and cultivated by their tenants.

There is no element of estoppel in the case. It is true that the fact appears that the administrator stated at the sale that there had been no reservation of the crops, but his statement could not prejudice the appellees. Besides, this was a judicial sale, and the rule *caveat emptor* applied. *Martin v. Beasley*, 49 Ind. 280; *Henderson v. Whiting*, 56 Ind. 131. The appellees were parties to the proceedings to sell, but they were only parties in their capacity as heirs. The proceedings could only affect them as heirs. *Compton v. Pruitt*, 88 Ind. 171; *Elliott v. Frakes*, 71 Ind. 412; *Unfried v. Heberer*, 63 Ind. 67. The court made no order to sell the crops, but if it had, its order, for the reasons already given, would have been void. We can imagine no legal reason for the appellant's claim to the cord-wood or crops. In a legal sense he had no more right to the wood or crops than he had to any other personal property belonging to the appellees.

The judgment is affirmed, with costs.

Filed Feb. 2, 1889.

#### ON PETITION FOR A REHEARING.

BERKSHIRE, J.—In the preparation of the original opinion the fact that the record disclosed the date at which the petition to sell was filed was overlooked. The record shows the petition to have been filed on December 24th, 1884; that fact, however, will not alter the conclusion announced in the original opinion. The original order to sell the real estate

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was made October —, 1885, and was for a public sale; on the 2d day of May, 1886, the order was changed to an order for a private sale.

The property was sold and conveyed June 27th, 1887. At that time the crops over which the controversy arose were growing on the land, but had no existence at the date of the decedent's death. This was a fact of which the purchaser was bound to take notice, and it should not have been overlooked by the administrator when he had the real estate appraised. Ordinarily, as between vendor and vendee, growing crops pass with the freehold and as a part of the freehold, but this only applies as to growing crops which belong to the vendor. Growing crops belonging to somebody else do not pass. The vendor can not pass the title to that which does not belong to him. This is a proposition too plain to require the citation of authorities.

The purchaser at the administrator's sale acquired title to the freehold, and to whatever belonged to it at the time of his purchase, but he acquired nothing more. The appellees were not the vendors of the purchaser; he acquired his title from the decedent through the administrator.

The appellees sowed, planted and cultivated the crops in controversy, and during the time were rightfully in possession of the real estate, and had the right to cultivate it. The crops were therefore no part of the freehold, but personal property belonging to the appellees. Under the circumstances, the appellant had no interest in the crops or claim upon them.

The petition is overruled, with costs.

Filed May 9, 1889.

Watson et al. v. Camper.

No. 13,699.

## WATSON ET AL. v. CAMPER.

**MORTGAGE.—Married Woman.—Consideration.—Judgment.—Estoppel.—**

Where a mortgage, executed by a married woman upon her separate land to secure her husband's debt, is foreclosed in a proceeding to which she is a party, and the land ordered sold, she can not afterwards, in a collateral proceeding, question the consideration upon which the mortgage rested.

**PARTITION.—Title.—Estoppel.—**Ordinarily the title to land is not in issue in a suit for partition, but the pleadings may be so drawn as to put it in issue; and where the plaintiff sets out his title at length, and the manner in which he acquired it, and the quantity claimed is set off to him by the court, the defendants are estopped by the decree to afterwards assert any interest therein.

From the Shelby Circuit Court.

*E. P. Ferris, W. W. Spencer and J. S. Ferris*, for appellants.

*B. F. Love, A. Major and H. C. Morrison*, for appellee.

**COFFEY, J.**—This was a suit, brought in the Shelby Circuit Court, by the appellants against the appellee to recover possession of and to quiet title to the land described in the complaint. The cause was, by proper pleadings, put at issue, and tried by the court without the intervention of a jury. At the request of the appellants the court made a special finding of the facts in the cause and stated its conclusions of law thereon. The special findings of facts, so far as they are material to the controversy here, are substantially as follows:

1. Jehu Rigsbee died, intestate, on the 19th day of July, 1871, the owner in fee of the northeast quarter of the northwest quarter of section 33, township 14 north, range 8 east, in Shelby county, Indiana, leaving as his only heirs his widow, Rachel Rigsbee, and the following children, viz., Lydia Watson, wife of Clayborn B. Watson, Eunice Watson, wife of Allen H. Watson, Mariah Moore, widow of

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125	115
127	499
119	60
138	632
119	60
148	395
149	477



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William Moore, deceased, and Andrew J. Rigsbee, to whom said land descended, one-third to the widow and the remaining two-thirds to said children in equal proportions.

2. On August 12th, 1871, Mariah Moore deeded all her interest in said land to the said Eunice Watson.

3. On the 15th day of September, 1873, the said Andrew J. Rigsbee sold and conveyed his interest in said land to Clayborn B. Watson for \$400, \$200 cash, one note for \$100, due fifteen months after date, and one note for \$100, due twenty-seven months after date.

4. On the 18th day of April, 1878, said Rachel Rigsbee conveyed to Lydia Watson one-half of her interest in said land, and on the same day she conveyed her other half interest to Eunice Watson. On the 1st day of April, 1885, Eunice Watson conveyed to the said Lydia Watson her interest in the north half of said land, and said Lydia Watson conveyed to the said Eunice her interest in the south half of the same.

5. On the 13th day of March, 1874, said Clayborn B. Watson and the said Lydia Watson executed to said Andrew J. Rigsbee a mortgage on the undivided one-fourth of said land to secure the payment of the two notes heretofore named. Both of said notes were afterwards assigned to Philip L. Burtch.

6. On the 12th day of May, 1874, the said Clayborn B. Watson and Lydia Watson executed to James W. Trees & Co. their note for \$195.93, and a mortgage upon the undivided one-fourth of said land to secure the same, in which it was recited that the said Lydia and Clayborn B. Watson were the heirs at law of Jehu Rigsbee, deceased.

7. On the 13th day of February, 1877, said Philip L. Burtch commenced his action against the said Clayborn B. and Lydia Watson to foreclose the mortgage given to secure the notes assigned to him. Process was duly served therein, and on the 5th day of March, 1877, he recovered judgment on said notes against the said Clayborn B. Watson for \$257.81,

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and a decree foreclosing said mortgage against all of said defendants. On the 10th day of May, 1877, said Burtch bid in said land, at a sheriff's sale on a certified copy of said decree, for the sum of \$310.10, paid his bid, and took a sheriff's certificate of sale for the same, and on the 28th day of May, 1878, took a sheriff's deed for the undivided one-fourth of said land.

8. On the 15th day of January, 1878, said James W. Trees & Co. filed their complaint in the Shelby Circuit Court against Clayborn B. Watson, Lydia Watson and Philip L. Burtch to foreclose their said mortgage, and to obtain judgment on their said note. The defendants were all duly served with process. In said complaint it was recited that the interest mortgaged to them was the undivided one-fourth of said land, which descended to said Lydia Watson as one of the four children of Jehu Rigsbee, deceased, and that Philip L. Burtch, on the 5th day of March, 1877, had recovered a judgment for the sum of \$257.81 in the Shelby Circuit Court, and for the foreclosure of a mortgage on the undivided one-fourth part of said forty-acre tract of land; that the mortgage so foreclosed by said Burtch was executed by Clayborn B. Watson and Lydia Watson to Andrew J. Rigsbee, said Andrew J. Rigsbee being one of the four children of Jehu Rigsbee, deceased; that said mortgage was executed to secure the unpaid purchase-money of the interest of the said Andrew J. Rigsbee in said land conveyed by him to the said Clayborn B. Watson; that said mortgage was on another and different interest from that conveyed and mortgaged to the said plaintiffs. Philip L. Burtch appeared to said action, and filed an answer admitting the allegations in the complaint. The said Lydia Watson and Clayborn B. Watson made default. On the trial of the cause the court found the allegations in the complaint to be true, and that the interest covered by the mortgage held by the said Burtch was on a different interest from the one covered by the mortgage held by the plaintiffs, and the court rendered judgment for the plaintiffs for the sum

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of \$209.40, and entered a decree of foreclosure. On the 18th day of May, 1878, James W. Trees became the purchaser of said interest at a sheriff's sale on a certified copy of said decree, and on the 20th day of May, 1879, he procured a sheriff's deed therefor.

9. On the 18th day of March, 1879, Philip L. Burtch commenced a partition suit in the Shelby Circuit Court against Lydia Watson, Clayborn B. Watson, Eunice Watson, Allen Watson and Rachel Rigsbee, who were all duly served with process. The complaint recites the fact of ownership of the real estate by Jehu Rigsbee, and the names of the widow and children and their respective interests in said land by descent, the conveyance above named, and then avers that they (Lydia and Clayborn B. Watson), to wit, on the 13th day of March, 1874, and while they together owned one-third of said real estate, executed to Andrew J. Rigsbee their certain mortgage to secure the promissory notes of said Clayborn Watson for \$200, in and by which they mortgaged to said Rigsbee the undivided one-fourth part of said real estate; that said notes had been assigned to plaintiff, the mortgage foreclosed, and that he had purchased said land at sheriff's sale and had procured a deed therefor; that he was the owner of one-fourth in value of said land; that Eunice owned one-third in value, Rachel Rigsbee one-third in value, and Lydia Watson one-twelfth in value. The court found that the material allegations in the complaint were true, and ordered partition as prayed. The commissioners appointed by the court set off to the said Burtch ten acres in a square form in the northwest corner of said forty-acre tract, which was confirmed by the judgment of the court. There has been no change in the title of the parties since said partition.

10. On the 31st day of December, 1880, said Burtch conveyed said ten acres to Samuel Douthit, and on the 17th day of January, 1881, Samuel Douthit conveyed the same to the appellee, William H. Camper.

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*Watson et al. v. Camper.*

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11. In said partition suit the title to said land was not put in issue except as above stated.

12. The appellant Lydia Watson joined in the said mortgage to Andrew J. Rigsbee and was a party to the foreclosure suit by the said Burtch to foreclose the same, but no consideration therefor passed to her.

Upon these facts the court stated as conclusions of law:

1st. That in the foreclosure suit of James W. Trees & Co. against Clayborn B. Watson, Lydia Watson and Philip L. Burtch, the mortgage in that case was upon the interest of Lydia Watson that descended to her from her father, and no other and different interest, and was so foreclosed against all the defendants, and the interest claimed by Burtch was a different interest, and the same was fully determined by the decree of the Shelby Circuit Court on the 8th day of May, 1878, and that decree binds Philip L. Burtch and the persons to whom he conveyed the land after that date, including the defendant, William H. Camper.

2d. That the defendant, William H. Camper, is the owner in fee simple and the plaintiff should not have partition thereof nor her title quieted or maintained.

3d. That in the partition suit of Philip L. Burtch the same parties can not again have partition of the same lands when no change has taken place in their titles.

4th. That Lydia Watson was estopped by joining with her husband in the mortgage to Andrew J. Rigsbee, made May 12th, 1874, as stated in the sixth finding above, she having mortgaged a part of her own land.

5th. Upon these findings I find for the defendant.

The appellants excepted to each of these conclusions of law. Several errors are assigned, but the only one which we deem it necessary to consider is the one calling in question the correctness of the conclusions of law stated upon the facts as found.

It is first urged by the appellants that so much of the mortgage executed by the appellants to Andrew J. Rigsbee

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as covers a part of the land of Lydia Watson, is, as to her, without consideration, and can not be enforced.

We do not think that question is now open to inquiry. The Shelby Circuit Court having entered a decree, in a suit to foreclose that mortgage, to which the appellants were parties, ordering one-fourth of the forty-acre tract of land of which Jehu Rigsbee died seized sold to pay the notes executed to Andrew J. Rigsbee, we think it too late to question the consideration upon which the mortgage rested. That decree can not be questioned in a collateral proceeding like this. *Carrico v. Tarwater*, 103 Ind. 86 ; *Elwood v. Beymer*, 100 Ind. 504 ; *Landers v. Douglas*, 46 Ind. 522 ; *McCaffrey v. Corrigan*, 49 Ind. 175 ; *Bates v. Spooner*, 45 Ind. 489 ; *State, ex rel., v. Manly*, 15 Ind. 8 ; *Perkins v. Bragg*, 29 Ind. 507.

It is also contended that in the partition suit prosecuted by Philip L. Burtch, the title to the land in dispute was not in issue, and that, therefore, the appellants are not precluded by the decree rendered therein.

It is true that ordinarily in a partition suit the title to the land sought to be partitioned is not, strictly speaking, in issue. Yet it must be conceded that the pleadings may be so drawn as to place the title in issue. In this case, Burtch, in his complaint, set out at full length his title to the undivided one-fourth of the forty-acre tract of land owned by Jehu Rigsbee at the time of his death, and the manner in which he, Burtch, had acquired it. The court found the allegations of his complaint true, and ordered set off to him, as against the appellants, one-fourth of said land, which was done. If the appellants may now say, while that decree remains in full force, that they are entitled to any portion of the land so set off to him, then there is nothing to be attained by a suit for partition. We think that appellants are estopped by the decree rendered in that suit from claiming any interest in the land set off to Philip L. Burtch. *Carrico v. Tarwater*, 103 Ind. 86 ; *Elwood v. Beymer*, 100 Ind. 504 ; *Mc-*

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*Hess et al. v. Hess et al.*

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*Mahan v. Newcomer*, 82 Ind. 565; *Spencer v. McGonagle*, 107 Ind. 410.

As the appellants are estopped from claiming any interest in the ten acres of land set off to Philip L. Burtch, it follows that the court did not err in its conclusion of law that they were not entitled to recover in this action. There is no error in the record for which the judgment below should be reversed.

Judgment affirmed.

Filed May 9, 1889.

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No. 13,726.

HESS ET AL. v. HESS ET AL.

**REPLEVIN.**—*Landlord and Tenant.*—*Crops.*—*Special Finding.*—*Conclusion of Law.*—A special finding of facts, in an action of replevin, showing that the plaintiff had leased certain land for the term of one year, and as much longer as he desired to retain it, will not support a conclusion of law that he is entitled to clover seed produced upon the land in the third year after the lease was executed, unless there is also a finding that the tenancy continued up to that time.

From the Marshall Circuit Court.

*J. D. McLaren* and *E. C. Martindale*, for appellants.

*C. Kellison* and *A. C. Capron*, for appellees.

**OLDS, J.**—This is an action of replevin, brought by the appellees against the appellants, to recover the possession of personal property described in the complaint as “a certain quantity of unthreshed English clover seed, the same being cut and contained in two fields, containing about eight and

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*Hess et al. v. Hess et al.*

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five acres, respectively, on the following real estate in Marshall county, Indiana, to wit: The north half of the northeast quarter and the southwest quarter of the northeast quarter of section number seventeen (17), in township thirty-four (34) north, of range three (3) east, of the value of one hundred and twenty-five dollars, of which defendants have possession unlawfully, wrongfully and without right, and which is unlawfully detained from plaintiffs by the said defendants."

The cause was submitted to the court, and the court found the facts and stated its conclusions of law, and rendered judgment in favor of appellees. The appellants excepted to the conclusions of law, and assign error upon them.

The special finding of facts is as follows: "On the 8th day of April, 1886, and for many years before that time, Peter Hess was the owner of the land in this county described in the complaint, to wit: The north half of the northeast quarter and the southwest quarter of the northeast quarter of section 17, township 34 north, of range 3 east; that on said day he conveyed said land by deed to Solomon Whitsell and his wife; that in the spring of 1884 Frederick Hess and Jacob Hess rented said land from Peter Hess; that these parties are brothers and all live near the said land; part of the time, after renting, Jacob lived on the land; that the renting was for a year, and for as much longer as the lessees desired to retain it; the said Peter was to receive as rents ( $\frac{1}{3}$ ) one-third that was raised on the land and the plaintiffs ( $\frac{2}{3}$ ) two-thirds; that in pursuance of this agreement, among other crops wheat was sown on part of the land in the fall of 1884; that on part of the land sown in wheat that year what is called English clover was also sown; that in 1886 this clover produced a crop for seed, which amounted to 53 bushels when threshed; that at the commencement of this suit, which was before the seed was threshed, the same was of the value of two hundred dollars; that the defendant for many years lived on adjoining lands to that described in the complaint, and at the time he took

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*Hess et al. v. Hess et al.*

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the conveyance aforesaid had constructive notice of the rights of the plaintiffs in and to the crops growing on the land described in the complaint.”

As conclusions of law on the facts found, the court stated that at the commencement of this action the plaintiffs were, and that they are now, entitled to the possession of the property in controversy, and that at the commencement of this action the defendants unlawfully detained the same.

The finding of facts is insufficient. There is a finding that the appellees, in the spring of 1884, leased of the appellant Peter Hess the land described in the complaint, for the term of one year and for as much longer as appellees desired to retain it; that in the fall of 1884, in pursuance of the agreement, wheat was sown on part of the land, and on part of the land sown to wheat clover was sown. There are no facts found showing that the lease was, by the option of appellees, continued or to be continued beyond the one year, and the clover was grown and harvested the third year from the date of the lease. In 1886 the clover produced a crop of seed, but there are no facts found showing that such crop of clover was the clover described in the complaint. There are no facts found showing that the defendants, the appellants, had possession of the land, or had possession of either the clover mentioned in the finding of facts or described in the complaint. Nor is it found by whom the wheat or clover was sown, except as it may be inferred. It is stated that in pursuance of the agreement, among other crops, wheat was sown, but it is not stated that it was sown by the plaintiffs or either of them. It was at least necessary, to continue the lease, to have found facts showing that the lessees continued in possession or gave notice of their intention to hold until the harvesting of the crop of clover in 1886. Clover is a grass, and the sowing of grass-seed would not of itself be sufficient to continue a lease until all the crops of seed which it would produce might be harvested. The finding of



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facts is not sufficient to warrant the conclusions of law in favor of the appellees or to entitle them to a recovery.

There was a motion for a new trial by appellants, assigning as a cause for a new trial that the finding of the court is not sustained by sufficient evidence, and the motion should have been sustained. *Crawford v. Powell*, 101 Ind. 421; *Quill v. Gallivan*, 108 Ind. 235.

The judgment is reversed, at the costs of appellees, with instructions to sustain appellants' motion for a new trial and for further proceedings not inconsistent with this opinion.

Filed May 9, 1889.

No. 13,735.

THE SECURITY COMPANY v. ARBUCKLE ET AL.

**MARRIED WOMAN.—Mortgage.—Suretyship.—Land Held by Entireties by Husband and Wife.**—To bring a mortgage, executed by a husband and wife upon land owned by them as tenants by entireties, to secure a loan of money made upon their joint application, within the prohibition of section 5119, R. S. 1881, making the wife's contracts of suretyship void, it must affirmatively appear that the money received did not enure to the benefit of the wife, or to the benefit of the joint estate.

**SAME.—Insufficient Finding of Wife's Suretyship.**—A finding that the money received on the mortgage was used by the husband "mainly in discharging his indebtedness upon which his wife was surety," and that he "recognized all the debts paid with the money as his individual debts, upon which his wife was only surety," does not constitute a sufficient finding of the fact of the wife's suretyship.

**SPECIAL FINDING.—Uncertainty.—New Trial.**—Where the special findings are uncertain and ambiguous upon material points, the judgment will be reversed for a new trial.

From the Hamilton Circuit Court.

119	69
120	196
121	277
119	69
124	174
125	256
126	203
119	69
128	22
119	69
130	40
119	69
131	193
119	69
134	481
119	69
149	19
150	588
119	69
159	165
119	69
160	528
160	529
160	530

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The Security Company v. Arbuckle *et al.*

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*T. J. Kane and T. P. Davis*, for appellant.

*J. Stafford and T. E. Boyd*, for appellees.

MITCHELL, J.—This was a suit to foreclose a mortgage executed by Matthew and Mary E. Arbuckle, on the 6th day of May, 1882, to Thomas C. Day, and afterwards assigned by the latter to the Security Company, of Hartford, Connecticut. The mortgage was adjudged invalid upon the ground that the real estate mortgaged was owned by the mortgagors, Arbuckle and wife, as tenants by the entireties; that the debt, to secure which the mortgage was given, was the debt of Matthew Arbuckle, the husband, and that Mary E. Arbuckle, wife of the former, received no part of the consideration for which the mortgage was executed. It became a question, under the pleadings, whether or not the mortgagors were estopped to assert that the mortgage debt had not been contracted for the benefit of their joint property.

The only material facts found by the court are, that the land was owned as above stated, and that Matthew Arbuckle made an application to the mortgagee for a loan of \$1,000, but that the latter refused to make the loan until Mary E. Arbuckle joined in the application, when the loan was made to the husband and wife, both of whom signed the note and mortgage. Matthew Arbuckle drew the money from a bank upon a check drawn by the mortgagee, payable to both mortgagors.

It does not appear from the special finding what the money was borrowed for, and there is nothing in the findings to indicate how the money was used, except that it is recited that Matthew Arbuckle “used it mainly in discharging his indebtedness, upon which his wife was security;” and that he “recognized all the debts paid with the money as his individual debts, upon which his said wife was only surety.”

The foregoing can not, however, be accepted as the find-

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The Security Company v. Arbuckle et al.

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ing of any facts. Whether or not the note and mortgage sued on are within the prohibition of section 5119, R. S. 1881, which declares void any contract of suretyship entered into by a married woman, depends upon whether or not the consideration upon which they were executed enured to the benefit of Mrs. Arbuckle or to the benefit of her estate. *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Ward v. Berkshire L. Ins. Co.*, 108 Ind. 301.

The mortgaged estate being the joint property of both, and the loan having been made on the joint application of both mortgagors, the burden is upon them to make it appear that the consideration of the notes was not obtained and used for the benefit of the joint estate. This is not the case of a married woman mortgaging her separate estate to secure a debt which appears to be the obligation of herself and another. This is the case of the owners of a joint estate who joined in a mortgage thereon to secure the apparent obligation of both, and it must affirmatively appear that the debt was not for their joint benefit.

Upon these material and controlling facts the special findings of the court are either entirely silent, or they are so uncertain and ambiguous as to leave the court wholly without any facts upon which to rest its judgment.

That the money received was used *mainly* to pay off debts which the husband recognized as his debts, amounts to no finding at all. Whether the debts paid off were the debts of the husband, and whether Mrs. Arbuckle was merely surety for him, depends upon facts, and not upon the mental attitude of the parties.

It should be observed that the same uncertainty which characterizes the special finding of the court pervades the pleadings. General statements to the effect that the defendant Mary E. Arbuckle executed the note and mortgage as surety for her husband, are not a sufficient statement of facts. Whether she was surety or not depends upon the purpose for which the money was borrowed, and to which it was applied.

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If it was borrowed and used to pay off debts of her husband, which did not constitute valid incumbrances on the joint estate, or if it was not in some way used for her benefit or the benefit of her estate, she was a surety. These facts are neither directly averred in the pleadings nor are they found by the court. This is not a case where the findings of the court are merely silent upon a material point in issue. It presents a case where the findings are uncertain and ambiguous. The justice of the case requires that the judgment should be reversed, and a new trial ordered upon amended pleadings.

The judgment is reversed, with costs.

Filed May 15, 1889.

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No. 13,684.

HARTMAN v. RINGGENBERG ET AL.

**CHATTEL MORTGAGE.**—*Conversion by Mortgagee.*—*Extinguishment of Mortgage Debt.*—Where a chattel mortgagee, by virtue of a power reserved, takes possession of the mortgaged property and converts it to his own use, the mortgage debt is extinguished to the extent of the value of the property at the time of the conversion.

**SAME.**—*Replevin.*—*Conversion.*—*Right of Mortgagor to Have Mortgage Cancelled.*—Where a mortgagee, who has obtained possession of the mortgaged property by replevin proceedings, fails to return it upon judgment being rendered against him, and converts it to his own use, the same being of greater value than the mortgage debt, the mortgagor, in a suit to foreclose the mortgage, is entitled, by cross-complaint, to have the mortgage cancelled and the notes secured thereby adjudged satisfied.

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Hartman v. Ringgenberg *et al.*

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**BILL OF EXCEPTIONS.**—*Filing too Late.*—When time is given until a day named to file a bill of exceptions, a bill filed on that day is too late and does not become a part of the record.

From the Marshall Circuit Court.

*J. W. Parks* and *A. C. Capron*, for appellant.

*J. D. McLaren* and *E. C. Martindale*, for appellees.

OLDS, J.—The appellees were the owners of horses, buggies, harness and other personal property comprising a livery stock, and, on the 8th day of August, 1882, sold the same to the appellant, and as a part of the purchase-price appellant executed to the appellees his four promissory notes of that date, each for the sum of four hundred dollars, due respectively in one, two, three and four years from date; he also executed to the appellees a chattel mortgage, on the said personal property so purchased, to secure the payment of said notes. On August 14th, 1885, the appellees filed their complaint in this action against the appellant to foreclose said mortgage and for judgment on said notes. The appellant, the defendant below, filed an answer in three paragraphs. To the amended third paragraph of answer, the plaintiffs filed a demurrer for cause that said paragraph does not state facts sufficient to constitute a defence to the complaint, which demurrer was sustained and appellant reserved exceptions to the ruling and assigns the same as error.

The amended third paragraph is as follows: “The defendant, *Ira C. Hartman*, for amended third paragraph of answer herein, says he admits the execution of the promissory notes and chattel mortgage set up and mentioned in the complaint, but he avers that the sole and only consideration for the said notes was the purchase-price of the personal property described and mentioned in the said chattel mortgage, on that day sold and delivered by the plaintiffs to the defendant, and said chattel mortgage was executed to secure the payment of such purchase-money notes, and for no other and different consideration; and defendant says that, prior to the 12th day

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*Hartman v. Ringgenberg et al.*

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of May, 1883, he paid on said notes to the plaintiffs the sum of one hundred dollars, and as to the residue of said notes the defendant says that, on the 12th day of May, 1883, the said plaintiffs did, by virtue of the terms of said mortgage and the power therein contained, and on a pretence that the conditions of said mortgage had been broken by this defendant, seize and take into their absolute possession and take from this defendant all said personal property, being the identical property against which a foreclosure is sought in this action ; that said property was, at the time it was so seized and taken by the plaintiffs, of the value of two thousand dollars, and its value was largely in excess of the amount due to plaintiffs on said notes ; and defendant avers that plaintiffs did not proceed, in any manner, to make a legal sale of said property, by foreclosure or otherwise, but, on the contrary, they placed said property, which comprised and constituted a valuable livery stock, in their barns and livery stable at Bourbon, Indiana, and used the same continually in their livery business, and the entire property so taken has been converted to plaintiffs' own use. A copy of said mortgage is herewith filed and made a part of this answer. Whereby the defendant says that the said notes and mortgage are wholly satisfied, and he prays judgment for his costs." A copy of the mortgage is also set out and made a part of the complaint.

The mortgage contains a stipulation that the mortgagor shall use said property well and keep the same in good repair, and upon failure to do so the mortgagees shall have the right to take immediate and unconditional possession of the same for their own use forever.

The rule, as applicable to such mortgages as the one executed by the appellant to the appellees, is, that in case the mortgagees take possession of the mortgaged property and convert the same to their own use, it operates as an extinguishment of the mortgage debt to the extent of the value of the property at the time it was so taken and converted by the

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mortgagees. *Landon v. White*, 101 Ind. 249; *Lee v. Fox*, 113 Ind. 98.

It is averred in this paragraph of answer that the plaintiffs, the mortgagees, took absolute possession of all the mortgaged property on the 12th day of May, 1883, and have ever since retained and used the same and converted the property to their own use, and that at the time they so took the same it was of the value of two thousand dollars, an amount largely in excess of the amount due on the notes secured by the mortgage. Such a state of facts is averred as satisfied and extinguished the mortgage debt, and constituted a good defence to the complaint. The court erred in sustaining the demurrer.

The next error assigned is the sustaining of the demurrer to the defendant's cross-complaint. The cross-complaint alleged substantially the same facts stated in the third paragraph of answer, except as to the manner in which the appellees obtained possession of the mortgaged property. It is alleged in the cross-complaint that the appellees brought an action of replevin for the possession of the mortgaged property, and obtained possession by giving bond as required by law, and upon the trial of said action in replevin there was a verdict and judgment in favor of appellant, the defendant therein, which judgment was appealed from by the appellees and affirmed by this court, and that appellees retained possession of and used the property, sold parts of it, and converted all of it to their own use, and that it was of the value of two thousand dollars, an amount largely in excess of the amount due on the notes secured by the mortgage, and it asks that the notes be declared satisfied and for a cancellation of the mortgage.

In the case of *McFadden v. Ross*, 108 Ind. 512, it was held that when a mortgagee obtained possession of the mortgaged property by proceedings in replevin, he may show in mitigation of damages, in an action on the bond to recover the value of the property, that he holds an unpaid chattel

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*Hartman v. Ringgenberg et al.*

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mortgage upon the property, unless estopped by the adjudication in the replevin suit, and that he is not so estopped by the replevin suit unless the title to the property is distinctly put in issue. It is alleged in this cross-complaint that in the action of replevin for the possession of the property, the mortgagees' right to recover was based upon the ground that the mortgagor had failed to keep said property well and in good repair. The action of replevin being possessory in its character, the presumption, if any would arise in the absence of any averments, would be that the title was not in issue. The mortgagor, the defendant in the replevin suit, would have the right, upon the termination of the suit in his favor, to either bring an action on the bond for damages sustained by reason of a failure of the mortgagees to return the property, or to set up the retention and conversion of the property as a defence to an action for a judgment on the note and foreclosure of the mortgage. The cross-complaint was sufficient and the court erred in sustaining a demurrer thereto.

There are other errors assigned in overruling an application of the appellant to file an additional paragraph of answer and cross-complaint, but time was given until the fifth Friday of the March term, 1886, to file a bill of exceptions, and the bill of exceptions was presented and filed on the fifth Friday of said term. It has been repeatedly held by this court that when time is given until a day named to file a bill of exceptions, a bill filed on the day named is not within the time fixed for the filing. *Corbin v. Ketcham*, 87 Ind. 138; *Erb v. Moak*, 78 Ind. 569; *Volger v. Sidener*, 86 Ind. 545, 549; *Flory v. Wilson*, 83 Ind. 391. The bill of exceptions is not in the record, and no question is presented as to the ruling of the court on the application to file additional paragraphs of answer and cross-complaint. For the errors of the court in sustaining demurrers to the amended third paragraph of answer and to the cross-complaint, the judgment must be reversed.

Judgment reversed, at costs of appellees, with instructions



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The Cincinnati, Indianapolis, St. Louis and Chicago R'y Co. v. Geisel.

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to overrule the demurrers to the amended third paragraph of answer and to the cross-complaint, and for further proceedings not inconsistent with this opinion.

Filed May 14, 1889.

119	77
126	335
119	77
128	270
119	77
130	533

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No. 12,449.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO  
RAILWAY COMPANY v. GEISEL.

**RAILROAD.—Deed.—Right of Way.—Easement.**—A deed releasing and quitclaiming to a railroad company “the right of way for so much of said railroad, being eighty feet wide, as may pass through the following described land,” etc., conveys merely an easement, the fee remaining in the grantor.

**SAME—Character and Extent of Estate Acquired.—Contract.**—Where a railroad company acquires an estate in land for the use of its tracks by contract with the owner and not by proceedings under the right of eminent domain, the character and extent of the estate are to be determined by the contract, and are not affected by charter provisions authorizing it to acquire a greater estate than that contracted for.

From the Marion Superior Court.

*A. W. Hendricks, O. B. Hord, E. Daniels and A. Baker,*  
for appellant.

*D. V. Burns,* for appellee.

**ELLIOTT, C. J.**—The question in this case is this: Did the deed of Gilbert McCoy vest in the appellant’s grantor an estate in fee to the land described in it? The deed reads thus:

“RELEASE OF RIGHT OF WAY.

“I, Gilbert McCoy, of the county of Marion, and State of Indiana, for and in consideration of the advantages which

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The Cincinnati, Indianapolis, St. Louis and Chicago R'y Co. v. Geisel.

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may or will result to the public in general and myself in particular, by the construction of the Lawrenceburgh and Upper Mississippi Railroad, as now surveyed, or as the same may be finally located, and for the purpose of facilitating the construction and completion of said work, do hereby, for myself, my heirs, executors, administrators and assigns, release, relinquish and forever quitclaim to the Lawrenceburgh and Upper Mississippi Railroad Company, the right of way for so much of said railroad, being eighty feet wide, as may pass through the following described piece, parcel or lot of land, to wit: The southwest quarter of section 26, town. 15, range 4 east: *Provided*, and on the condition, that the company pays me one hundred dollars in railroad stock of said company. It is also understood that the company is to make two or three pits where I may want them. It is also understood that I reserve all the timber for my own use. I am to occupy all the ground up to the grade after said road is finished. And I will hereby further release and relinquish to the said railroad company, all damages and right of damages, actions and causes of actions, whatever, which I might sustain, or be entitled to, by reason of anything connected with or consequent upon the location or construction of said work, or the repairing thereof when finally established and completed."

A right of way is an incorporeal hereditament, and this is all that the deed conveys. *Stuyvesant v. Woodruff*, 1 Zab. (N. J.) 133; *Bodfish v. Bodfish*, 105 Mass. 317; *Williams v. Western Union R. W. Co.*, 50 Wis. 71; *Wild v. Deig*, 43 Ind. 455; *Pfaff v. Terre Haute, etc., R. R. Co.*, 108 Ind. 144.

The grant of a right of way is the grant of an easement and implies that the fee remains in the grantor. A person who has a right of way has nothing more than a right of passage, and can not be the owner of the *corpus* of the land. It is a settled rule that where the owner of the fee becomes the owner of the easement, the less estate is merged in the greater, but where one person owns only the right of way

Miller v. Powers.

the fee is in the owner of the servient estate. Here the only estate the deed professes to convey is the right of way, and consequently the fee remains in the grantor, since, where one party has a right of way, the other has the fee.

We do not think the question before us is affected by the provisions of the charter of the appellant's grantor, for here the right is founded entirely upon contract, and not upon proceedings under the right of eminent domain. The question is not what estate might have been acquired, but what estate did the one party bargain for and the other convey? It does not follow that because a railroad company may take an estate in fee, or a right of way of a defined width, it does take such an estate, or such a right of way, for parties may by their contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire. *Indianapolis, etc., R. R. Co. v. Reynolds*, 116 Ind. 356.

Judgment affirmed.

Filed May 15, 1889.

No. 14,244.

MILLER v. POWERS.

**FRAUD.—Insurance.—Execution of Assignment.—Misrepresentation as to Character of Instrument.—Laches.**—Where a widow, the sole heir, ignorant of the existence of insurance upon the life of her deceased husband, but being able to read, and having opportunity to do so, signs and acknowledges the execution of an assignment of a policy of insurance written upon the policy, without reading or examining either the policy or the assignment, or requiring the same to be read to her, and relying blindly upon the representation of the assignee, who has possession of the policy

119	79
126	458
119	79
126	164
136	678
119	79
137	81
119	79
141	61
119	79
149	243
153	132

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and who has not made known to the widow its existence, that the writing which he presents for her signature is a receipt for money paid, she is guilty of such laches as will bar an action to avoid the assignment, in the absence of a stronger showing of fraud.

*SAME.—Statute of Limitations.—Concealment of Right of Action.*—The concealment of a right of action for relief against fraud, which will extend the time for bringing the action beyond the six years limited by clause 4 of section 292, R. S. 1881, must consist of more than the mere silence of the person subject to the action; there must be something of an affirmative character, something said or done which has the effect of preventing discovery of the right of action by the person entitled to the same.

From the Elkhart Circuit Court.

*J. H. Baker and F. E. Baker*, for appellant.

*H. C. Dodge*, for appellee.

BERKSHIRE, J.—The complaint is in one paragraph and is (omitting the title) as follows:

“Anna A. Powers complains of William H. Miller and says that, on the 3d day of January, 1880, she was the widow of Ira Edwards, who died on the 5th day of December, 1879, in the county of Elkhart, in the State of Indiana; that said Ira Edwards, at the time of his death, left him surviving this plaintiff, his widow, and no children, descendants of children, and no father or mother; that plaintiff is the sole and only person entitled to the entire estate of said Ira Edwards, after the payment of debts and the expenses of administration; that said Ira Edwards died intestate; that prior to the — day of September, 1885, no administrator had been appointed to settle said estate left by said Ira Edwards, at which last mentioned time Joel H. Austin was duly appointed by this court, and he duly qualified as administrator of said estate and entered upon the duties of his said trust; that at the time of the death of said decedent his life was insured in the Masonic Mutual Benefit Society, of the State of Indiana, in the sum of three thousand one hundred dollars, which insurance policy was numbered 4344, and was payable to the estate of said Ira Edwards; that, at the time said Ira

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Miller v. Powers.

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Edwards died, the said policy was in the possession of the defendant; that plaintiff had no knowledge that said policy was in force, and she never learned of the existence of the said policy until in August, 1885, at which time she requested the said Joel H. Austin to become the administrator of said estate; that the said defendant, with the intention of wrongfully converting the said proceeds of said policy to his own use, concealed from plaintiff the fact that he had the policy in his possession, and he also concealed from the plaintiff the fact that any insurance policy was in force insuring the life of said Ira Edwards; that, further intending to wrong and defraud plaintiff, the said defendant presented to said insurance company, without the knowledge or consent of plaintiff, proof of the death of said decedent; that, on the 3d day of January, 1880, the said defendant was indebted to the plaintiff (and at said day defendant was indebted to plaintiff), and at said day defendant called upon said plaintiff and paid to her his said indebtedness; that, at the time said defendant so paid said money to this plaintiff, he requested plaintiff to give him a receipt for said sum of money so paid, and the defendant presented to the plaintiff a paper writing for her to sign, and represented to plaintiff that said paper was a receipt for said money. Plaintiff avers that presentation to her of said receipt was but a pretext of said defendant to procure the signature of plaintiff to an assignment of her interest in said insurance policy, without her knowledge or consent, and without letting this plaintiff know that said insurance policy was in existence, insuring the life of said decedent, and purposely, with intent to defraud plaintiff, concealed from plaintiff that he held said policy; that plaintiff, intending to sign said receipt, and yet in ignorance that said decedent's life was insured, and relying on the honesty and good faith of the defendant, and unsuspecting of wrong-doing by defendant, plaintiff by inadvertence, and without the knowledge of the contents of the

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Miller v. Powers.

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paper she signed, and relying wholly upon the statements and representations of the defendant that the paper she was required to sign was a receipt for the money that defendant had just paid her as aforesaid, that plaintiff, without examination of said paper, without reading the same, or having the said paper read to her by any other person, and without any consideration whatever therefor, signed the following assignment of said policy, endorsed upon said policy, to wit :

“ ‘ For value received, I, Anna A. Powers, widow of the within Ira Edwards, deceased, do hereby assign, transfer and set over to William H. Miller, all my right, title, claim and interest in and to the within policy of insurance, and to the money thereby secured, I being the sole and only heir of Ira Edwards, he having no father or mother, and having left him surviving no child and no descendants of any child.

“ ‘ Witness my hand and seal, this 3d day of January, 1880.

“ ‘ ANNA A. EDWARDS.’

“ Plaintiff avers that she acknowledged the execution of said assignment before a notary public, but at the time she so acknowledged the said assignment she did so under the mistake that said instrument was simply a receipt for said money, aforesaid, and nothing else, and without any knowledge whatever that she was assigning away the aforesaid policy of insurance, or any interest therein, and without any knowledge that such a policy, or any insurance policy, on the life of said Ira Edwards was in force ; that further intending to defraud the plaintiff, the defendant presented the said policy and the assignment thereon, obtained as aforesaid, to the said insurance company, and the said insurance company paid to the defendant on said policy the sum of three thousand and one dollars and fifteen cents, on the 17th day of February, 1880 ; that said defendant converted all of said money to his own use, without right and wrongfully ; that said insurance company paid said money to defendant without any knowledge that plaintiff had assigned the same to defendant by mistake. Plaintiff further represents that she was in igno-

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rance of all the aforesaid facts, including the fact that she had assigned said policy of insurance to defendant, until August, 1885. Plaintiff would further show the court that the estate of said Ira Edwards, after the payment of debts and the expenses of administration, will all belong to her; that the money so collected by defendant is the money and property of said estate, and when recovered by said administrator will leave a surplus of \$2,000, over and above the debts, to be distributed to plaintiff. She further avers that said administrator has a suit pending in this court, number 1957, against said defendant, William H. Miller, for the recovery of said money from said Miller, in which said Miller relies upon the following defence, which has been held good by this court as a matter of law, that is to say:

“ ‘And for a third answer to said complaint the said William H. Miller says, that on the 24th day of January, 1878, Ira Edwards, who had been in full life and full health, with the expectancy of life of eighteen years, procured a certificate of membership and policy of insurance on his own life, in which it was provided as follows: “ This certificate of membership witnesses, that the Masonic Mutual Benefit Society, of Indiana, in consideration of the representation made to it by and in the application for membership, and the sum of six dollars to it in hand paid by Ira Edwards, of Goshen, Indiana, and the sum of one and 80-100 dollars to be paid to the secretary of the society, or to its accredited agent, by the said Ira Edwards within ten days after due notice has been served upon him of the death of a member of the society, as provided in the by-laws of the society, the sum of ninety cents to be paid upon the death of each member of the society so long as the said Ira Edwards shall belong to the first class, as shown in the margin of this certificate, and the sum of ninety-five cents upon the death of each member of the society so long as he shall belong to the second class, and the sum of one dollar and fifteen cents upon the death of each member of the society so long as he

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shall belong to the third class, and the sum of one dollar and eighty cents upon the death of each member of the society so long as he shall belong to the fourth class, the said society does promise to and agree with the said Ira Edwards, his heirs, executors, administrators and assigns, well and truly to pay to the estate of said Ira Edwards, or, in case of the previous death of the person or persons to whom the certificate is made payable, to the legal representatives of said Ira Edwards, within sixty days after due notice and satisfactory evidence of the death of the said Ira Edwards, and proof of interest if assigned, or held as security, the sum of seventy-five cents for every member of the society belonging to the first class, or shown in the margin of the certificate, at the time of the death of the said Ira Edwards, and the sum of seventy-five cents for every member of the second class, and the sum of ninety-five cents for every member of the fourth class." And the said defendant avers that the amount which would become due and payable to the estate of Ira Edwards, or his legal representatives, was indefinite and uncertain, depending on the number of members of said society at the time the said Ira Edwards should happen to die; and the said defendant avers that said Edwards, on and before the 18th day of February, 1878, was justly indebted to this defendant in a large sum of money, amounting in the aggregate to the sum of two hundred dollars, then past due, and the said Edwards was further desirous of borrowing other indefinite sums of money from time to time to pay the assessments of said certificate and keep the same in force; and this defendant avers that said Edwards, on the 18th day of February, 1878, being the owner and holder of said certificate of insurance on his own life, in consideration of said indebtedness which was then and thereby satisfied, and in consideration that this defendant would and did advance and pay for him divers other sums of money to the amount of two hundred dollars, which were not to be, and were not, charged to said Edwards, did sell, assign, transfer and set over said cer-



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tificate of insurance, being the same one mentioned in the complaint, to this defendant absolutely and without the reservation of any trust or interest therein, or in the proceeds thereof, which said sale and assignment were made in good faith by the said Edwards and this defendant, without any intent or purpose to speculate or wager on the life of said Edwards, who was then and there his intimate friend and Masonic brother, and bound by the rules and regulations of the lodge of Masons of which each was a member to render assistance in time and money to said Edwards if he should happen to be sick or disabled, and the said Edwards was then and there in good health with a prospect of long life; and this defendant avers that, at the time of said sale and assignment of said certificate of insurance, the said Edwards was not in debt to any one save and except this defendant, and said sale and assignment were made without any intent on the part of said Edwards or the part of this defendant to cheat, hinder or delay any creditors of the said Ira Edwards, but for the sole purpose of paying indebtedness so due and owing, and to grow due and owing to this defendant, which said sale and assignment were endorsed on said certificate of insurance, which was duly acknowledged and delivered to this defendant; and this defendant avers that the said Masonic Mutual Benefit Society was notified of and assented to the sale and assignment of said certificate, and that, on the 5th day of December, 1879, the said Ira Edwards died at the county of Elkhart, and State of Indiana; and this defendant avers that the said Ira Edwards left him surviving, at the time of his death, his widow, Anna A. Edwards, and no children nor descendants of children, and no father or mother, and said decedent left no debts; that, on the 3d day of January, 1880, the said Anna A. Edwards sold, assigned and transferred all her interest in and to said certificate and to the proceeds thereof, which said assignment was assented to by said Masonic Mutual Benefit Society; and afterwards this said defendant made to the said society the proofs of

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death, and that he was the owner thereof, and thereupon the said society paid said money to this defendant to and for his sole use, which is the same money sued for in said plaintiff's complaint. Wherefore, 'etc.

"She asks that said assignment of said insurance policy, so made by plaintiff and so procured by said defendant, be declared, adjudged and decreed to be fraudulent and void, and of no effect, and for all other proper relief to which plaintiff is equitably entitled."

The appellant filed a demurrer to the complaint, which was overruled and the proper exception taken. The complaint was clearly bad, and the demurrer ought to have been sustained.

The writing which the appellee, by this action, seeks to have nullified, as copied in the complaint, is as follows: "For value received, I, Anna A. Powers, widow of the within named Ira Edwards, deceased, hereby assign, transfer and set over to William H. Miller all my right, title, claim and interest in and to the within policy of insurance, and to the money thereby secured, I being the sole and only heir of Ira Edwards, he having no father or mother left him surviving, no child and no descendants of any child. Witness my hand and seal, this 3d day of January, 1880.

"ANNA A. EDWARDS."

The averments upon which fraud is predicated are in substance as follows: Ira Edwards, who died in the year 1879, in his lifetime procured a policy of insurance on his life; at the time of his death the said policy was in the possession of the appellant, but the existence of the policy and its whereabouts were unknown to the appellee until August, 1885; that on the 3d day of January, 1880, the appellant went to the appellee, ostensibly for the purpose of paying her some money which he owed her, and after making the payment produced what he said was a receipt for the money, and asked her to sign it, which she did, and acknowledged its execution before a notary public.

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The complaint avers, in general terms, that the appellant concealed from the appellee the fact that there was an insurance policy, and the further fact that the same was in his possession ; but what he said or did whereby she was kept in ignorance is not averred ; the most, therefore, that we can infer is, that the appellant remained silent. There is no averment in the complaint that the appellant even knew, when he presented the assignment to the appellee for her signature, that she did not know of the policy and of his possession thereof.

We must presume that when the appellee signed and acknowledged the assignment, she could read and write, and was capable of reading the assignment, if she had so desired, because the complaint avers nothing to the contrary. There is no charge in the complaint that any trick, artifice or imposition was practiced whereby the appellee was prevented from reading and examining the paper, and informing herself as to what it was. The assignment was necessarily before her when she executed it, and as it was endorsed on the policy, the latter was there also ; and, for all that appears in the complaint to the contrary, she had ample opportunity to have read and examined both instruments. Had she taken ordinary precaution she would have read the instruments before her, and would have not only ascertained their character, but also have learned that if she executed the assignment she would thereby transfer to the appellant all her interest in the policy. She acknowledged the assignment she supposed was a receipt, the complaint avers. The acknowledgment of a receipt is something very unusual, and something the law does not require for any purpose, and there is no allegation in the complaint that she did not know this at the time she executed the assignment ; if she did, this circumstance ought to have admonished her that she had better read the papers before executing the one she was called upon to execute.

It is evident, from the facts and circumstances which are

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disclosed in the complaint, that if the appellee was deceived, and because of the deception executed a paper entirely different from the one she intended to execute, it was in consequence of her own negligence and folly and not because of what the appellant represented to her, and in such a case the law affords no relief.

We quote from *Seeright v. Fletcher*, 6 Blackf. 380. The court says : “ It does not appear that the defendant was deceived by the representations made to him, or if he was, it is manifest that it was the consequence of his own folly. If the defendant were an illiterate man and the bond had been misread to him, he not being able to detect the imposition, the case would have been different. But it appears that he signed the bond without reading it himself, or hearing it read, and with all the means of knowing the truth in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. In such a case the law affords no relief.” *May v. Johnson*, 3 Ind. 449 ; *Rogers v. Place*, 29 Ind. 577 ; *Bacon v. Markley*, 46 Ind. 116 ; *Robinson v. Glass*, 94 Ind. 211 ; *Nebeker v. Cut-singer*, 48 Ind. 436 ; *American Ins. Co. v. McWhorter*, 78 Ind. 136 ; *Williams v. Stoll*, 79 Ind. 80 (41 Am. Rep. 604) ; *Baldwin v. Barrows*, 86 Ind. 351 ; *Gatling v. Newell*, 9 Ind. 572 ; *Clodfelter v. Hulett*, 72 Ind. 137 ; *Silver v. Frazier*, 3 Allen, 382 (81 Am. Dec. 662) ; *Bell v. Byerson*, 11 Iowa, 233 ; *Fulton v. Hood*, 34 Pa. 365 (75 Am. Dec. 664) ; *McCormack v. Molburg*, 43 Iowa, 562 ; *Mitchell v. Zimmerman*, 51 Am. Dec. 717 ; *Juzan v. Toulmin*, 9 Ala. 662 ; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283 ; *Skinner v. Deming*, 2 Ind. 558 ; *Casey v. Gregory*, 13 B. Mon. 505 ; *Warner v. Conant*, 24 Vt. 351 ; *Shelmire v. Thompson*, 2 Blackf. 270 ; *Munson v. Hollowell*, 26 Texas, 475 (84 Am. Dec. 582).

The first paragraph of answer is a general denial, and the second paragraph is as follows :

“ And the said defendant, for second answer to the plaintiff’s complaint, says the cause of action in said plaintiff’s com-

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plaint did not accrue within six years next before the commencement of this suit."

The appellee replied to the second paragraph of answer, in two paragraphs. The first paragraph is a general denial. The second paragraph of the reply is quite lengthy, and we will therefore not copy it into this opinion. There was a demurrer filed to this paragraph and overruled by the court, and an exception reserved. The paragraph is a mere repetition of the complaint, and, if good, then the paragraph of answer to which it is a reply was bad, and the demurrer filed thereto should have been sustained by the court.

The second paragraph of the answer was well pleaded. The action was for relief against an alleged fraud. Section 292, R. S. 1881, clause 4. Section 300, R. S. 1881, provides that if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced after the discovery within the period of limitation. The foregoing statute has been construed by this court as having reference to something of an affirmative character; something said or done, which has the effect to prevent a discovery of the right of action by the person entitled to the same. Mere silence by the person liable to the action is not a concealment within the meaning of the statute. *Boyd v. Boyd*, 27 Ind. 429; *Wynne v. Cornelison*, 52 Ind. 312; *Jackson v. Buchanan*, 59 Ind. 390; *Stanley v. Stanton*, 36 Ind. 445; *State, ex rel., v. Giles*, 52 Ind. 356; *Ware v. State, ex rel.*, 74 Ind. 181; *Musselman v. Kent*, 33 Ind. 453; *Wallace v. Metzker*, 41 Ind. 346; *Sankey v. McElevey*, 104 Pa. St. 265 (49 Am. Rep. 575); *Bricker v. Lightner*, 40 Pa. St. 199; *Wickersham v. Lee*, 83 Pa. St. 416; *Ferris v. Henderson*, 12 Pa. St. 49; *Smith v. Bishop*, 9 Vt. 110; *Fee v. Fee*, 10 Ohio, 469; *Allen v. Mille*, 17 Wend. 202; Wood Lim. 586, section 274 *et seq.*

The following is all that is averred in this paragraph of reply with reference to concealment: "She further avers that the defendant concealed from plaintiff the fact that she

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had executed to him an assignment of said policy, and never informed her of said fact." All that this allegation amounts to is that the appellant knew the facts and remained silent.

There are other important questions in the record, which, in view of the conclusions reached as to the questions already considered, we do not feel called upon to consider.

The judgment is reversed, with costs, with directions to sustain the demurrer to the complaint.

MITCHELL, J., took no part in the consideration of this case.

Filed May 14, 1889.

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No. 13,710.

**ROSS ET AL. v. THE STATE, FOR THE USE OF ZENOR,  
DRAINAGE COMMISSIONER.**

**DRAINAGE.—Assessment.—Enforcement of.—Complaint.**—A complaint to enforce the collection of an assessment under the drainage act 1883 is bad unless a copy of the report of the commissioners making the assessment, in so far as it relates to the land in question, is filed therewith.

**SAME.—Description.—When Void for Uncertainty.**—An assessment upon land described as "Pt. S. E.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E." and "Pt. S. W.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E.," is not enforceable, the description being void for uncertainty.

From the Harrison Circuit Court.

*B. P. Douglass* and *S. M. Stockslager*, for appellants.

*W. Cook* and *W. Ridley*, for appellee.

**OLDS, J.**—This is an action to collect a pretended assessment against the lands of appellant Jesse Ross for the con-

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struction of a drain. The petition for the construction of a ditch was filed in the circuit court in December, 1881. The commissioners filed their report, the same was approved by the Harrison Circuit Court and the ditch established at the May term, 1882, of said court, but the work was not referred to a commissioner for construction, and no further proceedings were had, until after the passage of the drainage act of 1883.

A demurrer was filed to the complaint, and was overruled and exceptions reserved, and the ruling is assigned as error.

The complaint sets out the proceedings, alleging the filing of the petition, the report of the commissioners and its approval and the establishing of the ditch as hereinbefore stated, and that Amos Zenor was qualified as a drainage commissioner by virtue of his office as county surveyor. Zenor was appointed to construct the work, and, on the 13th day of April, 1885, he made out a notice that the proposed ditch had been established, setting forth the assessments as made and confirmed, and caused the same to be recorded in the recorder's office on the 14th day of April, 1885. The said commissioners afterwards made assessments, in writing, on the lands benefited, and filed copies of the said assessments made by the commissioner to whom the work was assigned for construction, but no copy of the assessments of benefits, as made and reported by the drainage commissioners and confirmed by the court, is filed with the complaint.

Section 5 of the drainage act of 1883 (Acts of 1883, p. 179) amends section 6 of the act of 1881, and the amended section provides that: "The filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners locating the work and fixing the amount of assessments, shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein, and not named in the original petition, and the amount of the assessment, as made or approved and confirmed by the court,

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shall be a lien upon the lands so assessed, from the time of filing the petition, except where lands are omitted in the petition and afterwards assessed and reported by the commissioners, and, as to such lands, the assessment shall be a lien from the date of filing the report of the commissioners."

By section 6 of the act of 1881, the lien was created by the assessment made by the commissioner to whom the work was assigned for construction, but that section was amended and its provisions changed by section 5 of the act of 1883, from which we have quoted above, before any lien attached to the land of Jesse Ross, and if any lien exists it was created by the act of 1883, and this court has repeatedly held that it is essential to the validity of a complaint to enforce the collection of an assessment under the act of 1883, that a copy of the report of the commissioners making the assessment and approved by the court, in so far as it relates to the land in question, must be filed therewith. It is not necessary to set out all of the descriptions of the real estate owned by other persons. *Wishmier v. State, ex rel.*, 110 Ind. 523. The complaint is defective, and the demurrer should have been sustained. *State, ex rel., v. Myers*, 100 Ind. 487; *Moss v. State, ex rel.*, 101 Ind. 321; *Cook v. State, ex rel.*, 101 Ind. 446; *Blakemore v. Dolan*, 50 Ind. 194.

There is a further objection urged to the complaint. The real estate of the said Jesse Ross is described in the proceedings and assessment as: "Pt. S. E.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E.," and "Pt. S. W.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E."

The assessment is the basis of the lien and is the foundation of the action, and it must contain a valid description of the real estate. This attempted description is too indefinite, and is void for uncertainty. *Boatman v. Macy*, 82 Ind. 490; *Eel River Draining Ass'n v. Topp*, 16 Ind. 242; *White v. Hyatt*, 40 Ind. 385; *Howell v. Zerbee*, 26 Ind. 214.

For the error in overruling the demurrer to the complaint the judgment must be reversed.



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There are some other errors assigned, but the questions may not arise again and it is not necessary to decide them.

Judgment reversed, at the costs of the appellee, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed May 15, 1889.

No. 12,884.

ENGLISH v. POWELL ET AL.

**REAL ESTATE.—Tenants in Common.—Adverse Possession.—Ouster.**—Occupancy of the whole estate for twenty years, under color and claim of title, by one tenant in common, constitutes an ouster of his co-tenant and gives title to the whole.

**SAME.—Possession under Invalid Tax Deed.**—Possession of land under a deed given upon a sale for taxes is adverse, though the title under the deed may be invalid.

**SAME.—Purchase by Tenant in Common at Tax Sale.**—A tenant in common, in possession of the whole property, can not acquire his co-tenant's title by a purchase at a sale for taxes which he has permitted to go delinquent; but adverse possession under a tax deed for twenty years will give title.

**SAME.—Partition.—Rents and Profits.—Tax Sale.—Adverse Possession.**—To a complaint for partition and for an accounting for use and occupation, an answer alleging that the interest asserted by the plaintiff had been sold for taxes more than twenty years before the bringing of the suit, but failing to show that possession was taken under the sale and held for twenty years, is bad.

**SAME.—Land Sold for Taxes.—Action to Recover.—Limitation.**—Section 250, 1 R. S. 1876, p. 127, providing that no action for the recovery of real property sold for taxes shall be brought after five years from the date of the sale, has no application to a suit for partition or to recover for use and occupation and for damages for waste.

From the Boone Circuit Court.

J. A. Abbott and I. M. Kelsey, for appellant.

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BERKSHIRE, J.—There are three paragraphs in the complaint. The first paragraph is an ordinary paragraph, alleging that the parties are tenants in common of the real estate described, and asking partition. The second paragraph alleges a tenancy in common of the real estate, use and occupation by the appellees, and demands an accounting and judgment for the one-fourth in value of the rents and profits during the time of occupation by the appellees. The third paragraph charges the appellees with having cut down and removed valuable timber from the real estate, and demands judgment for damages.

Demurrers were filed and overruled to the different paragraphs of complaint, and the proper exceptions were reserved.

Cross-errors have not been filed, nor is there any brief on file for the appellees. We are not, therefore, called upon to consider the sufficiency of the different paragraphs of the complaint, and decide nothing with reference to them, but, as bearing somewhat on the second paragraph, and possibly upon the third, we refer to *Crane v. Waggoner*, 27 Ind. 52, and *Humphries v. Davis*, 100 Ind. 369.

There are four paragraphs of answer in the record, numbered one, three, four and five. There was a second paragraph, which was withdrawn before the trial.

There are five errors assigned, but in their brief counsel for the appellant waive the first and second, leaving for our consideration the third, fourth and fifth. These are, in substance, as follows: 1. The court erred in overruling the demurrer to the fourth paragraph of the answer. 2. The court erred in overruling the demurrer to the fifth paragraph, and 3. The court erred in overruling the motion for a new trial.

The fourth paragraph of the answer alleges that, on the 6th day of May, 1857, one John M. Pritchard became the owner of the undivided three-fourths of the real estate in question; that, on the third day of January, 1859, the other undivided one-fourth of said real estate was sold by the au-

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ditor and treasurer of Boone county for the payment of delinquent taxes, and a certificate of purchase issued to one David A. Caldwell, who afterwards assigned the same to the said Pritchard, who, on the 12th day of January, 1861, received from the said auditor a deed for the said real estate so sold; that the said Pritchard had full and complete possession of said real estate from the 3d day of January, 1859, and from that time openly and notoriously asserted title and complete ownership, and received the entire rents and profits thereof until he conveyed the same, and that there has been a continued occupancy by the said Pritchard and those claiming under him, under claim of title, down to the date at which this action was brought.

That one tenant in common can oust his co-tenant and acquire title as against him by prescription, we have no doubt. Twenty years' occupancy, under color and claim of title to the whole estate, by one tenant in common, will give to the tenant so occupying title to the whole, as completely as though there had been no co-tenancy. Such an occupancy constitutes an ouster, and its continuance for twenty years gives title. Freeman Coten., sections 224, 242; *Nelson v. Davis*, 35 Ind. 474; *Dumont v. Dufore*, 27 Ind. 263; *Jenkins v. Dalton*, 27 Ind. 78; *Bowen v. Preston*, 48 Ind. 367; *Sanford v. Tucker*, 54 Ind. 219; *Nicholson v. Caress*, 76 Ind. 24.

Possession of land under a deed given upon a sale for taxes is adverse, though the title under the deed may be invalid. *Hearick v. Doe*, 4 Ind. 164; *Doe v. Hearick*, 14 Ind. 242. See *Sims v. Gay*, 109 Ind. 501, and *Wright v. Kleyla*, 104 Ind. 223.

One tenant in common can not, while in possession of the joint property and enjoying the rents and profits thereof, permit the same to go delinquent for non-payment of taxes and purchase it in at tax sale and thus acquire his co-tenant's title. *Bender v. Stewart*, 75 Ind. 88. But if the tenant in possession does permit the property to run delinquent, and purchases it at tax sale and afterwards procures a tax deed

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and occupies and holds possession of the property under the deed for twenty years, claiming to be the exclusive owner thereof, he thereby acquires a complete and perfect title to the whole.

Under the act of 1852, which was in force when the tax sale named in the said paragraph of answer was made, the purchaser was entitled to the possession at the date of his certificate. 1 *Gavin & Hord*, 106, section 151.

As we have seen, the certificate was issued on the 3d day of January, 1859; the action was commenced on the 3d day of September, 1879; this is over twenty years, and if the paragraph of answer averred that John M. Pritchard, on that day or any day thereafter twenty years before the commencement of the action, obtained an assignment of the certificate, and, after obtaining the certificate, that he took possession of the said undivided one-fourth of said real estate under it and occupied the same thereafter for twenty years before the institution of this suit, we would be inclined to hold the paragraph good. But the infirmity in the paragraph is that it fails to aver when Pritchard became the owner of the certificate, and fails to aver that he ever held possession under it. It is true it is averred that Pritchard went into possession on the day the certificate was issued, but we can not infer that his possession was under the certificate, and especially so when it is not averred that he then held it. The occupancy, if not under the certificate, was under his title to the three-fourths of said real estate, and was not inconsistent with the ownership and title of his cotenant. The answer was bad, and the court below erred in overruling the demurrer thereto.

The fifth paragraph of answer rests upon section 250 of the act of the Legislature upon the subject of the assessment and collection of taxes, found in R. S. 1876, vol. 1, p. 127. This section provides that no action for the recovery of real property sold for the non-payment of taxes shall lie unless brought within five years after the date of

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the sale. The action under consideration is not an action to recover the possession of real property, therefore this section of the statute is not applicable. *Farrar v. Clark*, 85 Ind. 449; *Bowen v. Striker*, 87 Ind. 317; *Gabe v. Root*, 93 Ind. 256. This paragraph of answer was also bad, and the action of the court in overruling the demurrer was erroneous.

The evidence was wholly insufficient to support the finding of the court. The land was wild land and was unoccupied until the year 1871. John M. Pritchard, in the year 1858, and after he acquired title to the undivided three-fourths of the land, lived in Johnson county, Indiana. He employed a man by the name of Evans to look after it and to see that it was not depredated upon, and Evans continued thus to look after it until the year 1871, when Pritchard sold and conveyed it. Evans' authority came at a time when Pritchard laid no claim to the one-fourth now in question, and it is not shown that any other or different authority was given him after Pritchard acquired the tax certificate or deed. It is clear that there was no such occupancy as constituted an ouster, and if there had been, the occupancy did not continue for twenty years before the institution of this suit.

Judgment reversed, with costs, with instructions to the court below to grant a new trial, and to sustain the demurrers to the fourth and fifth paragraphs of answer.

Filed May 15, 1889.

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The Peters Box and Lumber Company v. Lesh *et al.*

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No. 13,488.

THE PETERS BOX AND LUMBER COMPANY v. LESH ET AL.

**SALE.—*Fraud.—Representations of Agency.—When Title Does not Pass.—***

Where one fraudulently and falsely represents that he is the agent of a third person, and thereby, as such pretended agent, purchases personal property from another, who intends to vest the title in the supposed principal, the sale is void, vests no title in the impostor, and he can not by a subsequent sale confer title upon another.

**SAME.—*Demand.—Replevin.—Value of Property.—Measure of Damages.—***

In such case, where the property, consisting of lumber and logs, has come into the possession of a third person, of whom the owner demands it, the measure of the owner's recovery, in an action for possession, is the value of the property at the time and place of the demand, less any additional value it may have had by reason of labor bestowed upon it, in good faith, previous to the demand.

**SAME.—*Estoppel.—Bills of Lading.—***

If the seller of personal property, acting under the belief that the purchaser is the agent of another, and that he is selling the property to the latter, which belief is based on the representations of the fraudulent purchaser that he is such agent, permits the bills of lading to be made out in the name of such supposed agent, he is not thereby estopped to assert title as against a purchaser from the impostor.

From the Huntington Circuit Court.

*A. Zollars, H. Colerick and W. S. Oppenheim*, for appellant.

*T. E. Ellison and F. W. Rawles*, for appellees.

**COFFEY, J.**—This action was brought by the appellees against the appellant, in the Allen Circuit Court, to recover certain lumber and logs described in the complaint. The cause was put at issue by a general denial, and the venue was changed to the Huntington Circuit Court. The cause was tried by a jury, who returned a verdict for the appellees, assessing the value of the property at two hundred and seven dollars. Motion for a new trial overruled and excepted to, and judgment on the verdict.

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*The Peters Box and Lumber Company v. Lesh et al.*

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The errors assigned in this court are : 1st. That the Huntington Circuit Court had no jurisdiction over the cause. 2d. That the court erred in overruling the motion for a new trial.

No point is made in the brief of counsel for the appellant on the first assignment of error, and, therefore, the same is waived.

The evidence on the part of the appellees tends to prove that the appellant is a corporation, carrying on a large saw-mill and lumber business at the city of Fort Wayne, Indiana; that the appellees, in November, 1883, had been and were operating a saw-mill at Sidney, Kosciusko county, Indiana; that a man, calling himself Milliard, came to Sidney and represented to the appellees that he was the agent of the appellant, to buy lumber and logs for it; the appellant had, before that, to the knowledge of the appellees, bought such property in that vicinity, and they supposed he was such agent. One of the appellees went with the said Milliard to several places where he bought logs for the appellant, and they finally sold him, as the agent of appellant, the property in question, for two hundred and sixty-three dollars. By their agreement it was to be measured, put on the cars, the measurement to be sent to the appellant, and it to immediately pay the bill by a draft on New York. The property was measured, sold and shipped on Monday, and Milliard left Fort Wayne on Tuesday. The draft not coming, one of the appellees went to Fort Wayne on Tuesday, where he met Mr. Papa, the appellant's president, and asked him to pay for said property. Papa denied the authority of Milliard to act for the appellant, and, after demand, refused to deliver the property, and also refused to say much about the contract of appellant with Milliard, or to say how much he had been paid for the property. The appellant did, in fact, pay Milliard \$125 for the property in controversy. Immediately after the delivery of the property to it by Mil-

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*The Peters Box and Lumber Company v. Lesh et al.*

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liard, the appellant commenced to saw up the logs and mix the lumber with its own.

Up to this point there seems to be no disagreement about the facts. It is claimed by the appellant that bills of lading were made out for the property in the name of Milliard, with the consent of one of the appellees, but this fact is disputed by the appellees, who claim that there was nothing made out at the freight office from which the property was shipped except a receipt for the property.

The court gave to the jury the following instruction : "Should you find from the evidence that the title and right to possession of the property in controversy is in the plaintiffs, and if you further find that the defendant, in the purchase of said property, was in no fault, then you should find the value of said property at what you believe was its fair market value in the condition and place it was situated when the plaintiffs demanded the same of the defendant, if such demand were made, exclusive of any expenses or labor the defendant may have invested in manufacturing the same into lumber up to the time said demand was made ; but if the evidence shows defendant knew, or ought to have known, that Milliard was not the real owner, then you should not take into consideration any expense or labor the defendant put upon said logs and lumber, but give the plaintiffs a verdict for the full value at the time and place it was demanded, and in its condition then." To the giving of this instruction the appellant excepted.

The court had previously instructed the jury, substantially, that if Milliard had represented himself to the appellees as the agent of the appellant, and they, relying on such representation, sold him the property in controversy, as such agent, without any intention of vesting the title in him, but intending to vest it in the appellant, when he was in fact not the agent of the appellant, such sale was void and vested no title in Milliard, and he could not.



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by a subsequent sale, vest title to the property in the appellant.

This case comes clearly within the law, as enunciated in the case of *Alexander v. Swackhamer*, 105 Ind. 81. It is there distinctly decided that, in a case like this, no title passes to the fraudulent purchaser, and that such purchaser can not, by any subsequent sale, transfer title to another, for the reason that he has none to transfer. It must be true, then, that at the time the appellees demanded possession of the property of the appellant at Fort Wayne, the title was in them, as well as the right to the possession. It was the duty of the appellant to surrender to them such possession; and, upon its failure or refusal to do so, what were they entitled to recover?

It is earnestly contended by the learned counsel for the appellant that, as the freight from Sidney to Fort Wayne was paid by the appellant, the measure of the appellees' damages was the value of the property at Sidney. But it must be remembered that the appellant did not purchase the property at Sidney. It was purchased at Fort Wayne, and the appellant must be presumed to have taken into consideration the amount he would be compelled to pay to obtain possession of the property, in fixing its value at the time of the purchase. It certainly will not be contended that the appellant could refuse to deliver the possession upon demand, because it had paid the freight; nor can it be successfully claimed that Milliard, the fraudulent purchaser, could claim to have the freight refunded to him, if he had been caught at Fort Wayne before he had disposed of the property. Section 572, R. S. 1881, provides that, in actions to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof, in case a delivery can not be had, and for damages for the detention thereof.

It is not denied that at the time of the demand the appellant had the property in controversy, and that it could have

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delivered it to the appellees. By refusing to do so we think it became liable to the appellees for the value of such property at the time and place of such demand and refusal, less any additional value it may have had by reason of labor bestowed upon it, in good faith, before such demand was made. *Mitchell v. Burch*, 36 Ind. 529; Wells Replevin, sections 549, 563; *Cushing v. Longfellow*, 26 Me. 306.

It is claimed that in actions for trover the rule is different, but as this is an action of replevin we need not, and in fact do not, decide that question.

It is earnestly insisted by the learned counsel for the appellant that, as the appellees permitted Milliard to take bills of lading in his name, and thus enabled him to sell the property to an innocent purchaser for full value, they are now estopped from claiming the property in controversy, in the hands of the appellant. Instructions were given by the court, and others asked by the appellant and refused, which fairly raise this question.

The court instructed the jury that if Milliard had the bills of lading made out in his own name, as the consignor, to enable him to fraudulently sell the same to the defendant, and the plaintiffs knew that the property was so shipped, and that Milliard's purpose in so shipping said property was that he might fraudulently sell the same to the defendant, then their verdict should be for the defendant.

In the case of *Alexander v. Swackhamer*, *supra*, this court, by MITCHELL, J., says: "The appellee was not estopped, on the ground of negligence in delivering the cattle under the circumstances disclosed. To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defence which he proposes to set up, and another must have acted on such admission with his knowledge and consent."

If the appellees acted under the belief that Milliard was the agent of the appellant, and that they were selling the

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Bailey v. Martin *et al.*

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property to the appellant, basing such belief on the representations made to them by Milliard, we do not think that they would be estopped from claiming their property by reason of permitting the bills of lading to be made out in the name of the supposed agent. The instructions asked by the appellant ignore this phase of the case, and we think the court properly refused to give them. We are of the opinion that the instruction given by the court properly stated the law applicable to the case, as made by the evidence.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Feb. 21, 1889; petition for rehearing overruled May 15, 1889.

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No. 12,997.

BAILEY v. MARTIN ET AL.

**JUDGMENT.**—*Of Another State.*—*Action upon.*—*Loss of Complaint and Summons.*—*Proof of.*—*Deposition.*—In an action in this State upon a judgment rendered in another State, the depositions of the attorneys who obtained the judgment, and of the clerk of the court in which it was rendered, are competent to show the existence, loss and contents of the complaint and summons, and of the sheriff's return showing service upon the defendants.

**SAME.**—*Transcript.*—*Clerk's Certificate.*—*Evidence.*—The certification of the transcript of a judgment as a "true and correct copy" instead of as a "true and complete copy," is good.

**SAME.**—*Variance.*—Where the judgment sued on and the judgment shown by the transcript introduced in evidence are substantially the same, there is no material variance.

**SAME.**—*Court of Another State.*—*Jurisdiction.*—*Presumption.*—Where it appears that the court of another State which rendered a judgment sued

119	103
121	491
119	103
126	510
119	103
144	640
119	103
150	19
119	103
168	358

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Bailey v. Martin *et al.*

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upon in this State, was a court of record, having a judge, clerk and seal, its records and proceedings are brought within sections 454 and 472, R. S. 1881, and its jurisdiction and the regularity of its proceedings will be presumed until the contrary is shown.

**SAME.—Evidence.—Formal Irregularities.**—Mere formal irregularities constitute no ground for rejecting a duly certified record of a judgment of another State.

From the Knox Circuit Court.

*W. A. Cullop, G. W. Shaw and C. B. Kessinger*, for appellant.

*M. J. Niblack*, for appellees.

**BERKSHIRE, J.**—This was an action on a judgment rendered in a sister State. The complaint alleges that the appellees recovered a judgment against the appellant and one John Bailey and one Burton Bailey, in the district court within and for the county of Lamar, and State of Texas, at the November term thereof, 1875, for the sum of \$1,773.20, with interest thereon at the rate of ten per cent. per annum, and costs amounting to \$100, and that the said judgment remains due and wholly unpaid. It is also averred in the complaint that the court had jurisdiction, and that the judgment was duly rendered.

There was no service in this action on John Bailey; Burton Bailey made default, and the appellant appeared and filed an answer in two paragraphs. The first paragraph was a general denial. The second paragraph alleged that, at the time of the commencement of the suit mentioned in the complaint in the State of Texas, and from that time until the rendition of the judgment, the appellant resided in the State of Illinois, and was not during any part of the time in the State of Texas, or a resident of said State, and had no notice of the pendency of the said action, and did not appear thereto, either in person or by attorney.

To the second paragraph of answer the appellees filed a reply in general denial.

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*Bailey v. Martin et al.*

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The appellant moved to suppress all and parts of the depositions given by E. L. Dohaney, D. Ridley, T. I. Record and I. E. Ellis, taken on behalf of the appellees. The depositions of these witnesses were taken for the purpose of showing the existence, loss and contents of the petition and citation (complaint and summons), and the return of the sheriff endorsed upon the citation.

We are of the opinion that the several objections were properly overruled. The questions and answers disclosed the existence, loss and contents of these several papers. The existence and contents of these said writings were proven by the persons who prepared and filed them, and the loss was shown by the attorneys connected with the case, and by clerks and ex-clerks of the said court, by testimony which tended to show that diligent search had been made therefor among the files of the clerk's office to which they belonged.

The issues were submitted to the court for trial and a finding made for the appellees, and over a motion for a new trial judgment was rendered in accordance with the finding.

After the loss of the petition was proven, E. L. Dohaney, in his deposition, testified that he was a resident of Lamar county, State of Texas, and a lawyer by profession; that he was personally acquainted with the appellant; that in the summer of 1875 his firm received for collection from the appellees a note signed Bailey Bros. and Thomas S. Bailey, executed October 16th, 1873, payable to the plaintiffs' order four months after date, for the sum of \$1,365.80, with ten per cent. interest from maturity and attorneys' fees in case of suit. On the 6th day of July, said attorneys filed a petition or declaration for debt in the ordinary form against the defendants, in the office of the clerk of the district court of Lamar county, Texas; said cause was duly docketed on the docket of said district court of Lamar county, Texas, entitled, Edward Martin & Co. v. Bailey Bros., No. 2631, and, on the 5th day of November, 1875, judgment was ren-

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*Bailey v. Martin et al.*

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dered therein. The witness then states that in the State of Texas actions like the one under consideration are commenced by the filing of a petition, and causing the clerk to issue to the sheriff a citation to be served upon the defendant, which is the notice to appear and defend the action, and that the only papers that were filed in the said action were the petition and citation. Exhibit A, filed with and made a part of the witness' deposition, was shown to him, and he testifies that the paper is a substantial copy of the petition filed by his firm in said action. He states that he made the copy from his memory, aided by a memorandum from a private docket kept by his firm, and made at the time the petition was filed.

I. E. Ellis, who was also a member of the firm of Dohaney & Ellis, in his deposition, corroborates the witness E. L. Dohaney, as to the commencement of the suit, the contents of the note sued on and the contents of the petition, and states that he remembers that the citation issued about the 16th day of July, 1875, and that it was executed by the ministerial officer by leaving a copy of both the petition and citation with each of the defendants in person, and that the original was filed among the papers in the cause.

D. Ridley, in his deposition, testifies that when the suit of Martin against Bailey was instituted he was the clerk of the Lamar District Court, and that when the petition was filed he, as such clerk, issued a citation, which was about the 16th day of July, 1875. The witness then states that exhibit B, filed with and made a part of his deposition, is a substantial copy of the citation which he issued.

It will not be necessary to set out in this opinion the petition and citation as evidenced by the exhibits A and B, which appear as parts of the depositions of the witnesses Dohaney and Ridley; it is sufficient to say that the petition would be good as a complaint on a note in this State, and the citation sufficient as a summons. In fact, the only difference is in the

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name by which the papers are known. The following is a copy of the judgment rendered in the cause :

“ STATE OF TEXAS, COUNTY OF LAMAR :

“ At a regular term of the district court begun and held within and for the county of Lamar, in the State of Texas, at the court-house in Paris, on the 1st day of November, A. D. 1875, and which adjourned on the 1st day of January, A. D. 1876, the Hon. John C. Eastman, judge thereof, presiding, at the trial of the cause of Edward Martin & Co. v. Bailey Bros. the following judgment was rendered, viz.: The 5th day of said November term, 1875. Edward Martin & Co. v. Bailey Bros. This day came the plaintiffs by their attorneys, and the said defendants having failed to appear and answer in their behalf, but wholly make default, whereupon the plaintiffs, Edward Martin & Co., a firm composed of Edward Martin and John Martin, ought to recover of the said defendants, Burton Bailey, John Bailey and Thomas S. Bailey, their damages by reason of the premises; and it appearing to the court that the cause of action is unliquidated, and a jury having been demanded, it is ordered by the court that a jury be empanelled to assess the damages sustained by the plaintiffs, and thereupon came a jury of good and lawful men, to wit: S. S. Pierson and eleven others, who being duly empanelled, now return the following verdict :

‘ We, the jury, find for the plaintiffs; principal, thirteen hundred and sixty-five dollars and eighty cents; interest, two hundred and forty dollars and twenty cents, making the aggregate one thousand six hundred and twelve dollars, and we further find attorneys’ fees, one hundred and sixty-one dollars and twenty cents.

“ ‘ (Signed)

S. S. PIERSON, Foreman.’

“ It is, therefore, considered by the court that the said plaintiffs do have and recover of the said defendants the sum of \$1,612, the principal and interest, and the sum of \$161.20 attorneys’ fees, making a total sum of \$1,773.20, with inter-

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Bailey v. Martin et al.

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est thereon at the rate of ten per cent. per annum, together with all costs in this behalf expended, and that they have their execution. It is further ordered by the court that execution issue for the use of the officers of court against each party responsible for costs, by him in this behalf incurred."

The judgment is followed with the clerk's certificate, then follows the judge's certificate as to the clerk's official character, and the clerk's certificate as to the judge's official character. The clerk, in his certificate, states that the transcript of the judgment is a "true and correct copy." The point is made that the certificate is insufficient for the reason that the word *correct* is used instead of the word *complete*; that the certificate should have stated that the transcript of the judgment is a "true and complete copy." There is nothing in this objection. The certificates are in proper form and amply good. *English v. Smith*, 26 Ind. 445; *Anderson v. Ackerman*, 88 Ind. 481.

It is claimed that there is a variance between the judgment sued on and the judgment introduced in evidence. The judgment sued on is a judgment in favor of Edward Martin and John Martin against John Bailey, Burton Bailey and Thomas S. Bailey, which is substantially the judgment a transcript of which was given in evidence. We discover no substantial difference.

The question more earnestly discussed than any other in the case is, that the evidence does not show that the court in which the judgment was rendered was a court of general jurisdiction, and if not a court of general jurisdiction, then it does not appear that it had jurisdiction to render the judgment. It appears abundantly from the evidence that the district court of Lamar county, Texas, was a court of record, and a court having both a judge and clerk, and a seal; this brings its records and proceedings within the act of Congress, found in R. S. 1881, section 454, and within section 472, *Ib.*, and the presumption must be in favor of its jurisdiction



Johnson v. Conklin.

and the regularity of its proceedings until want of jurisdiction is shown.

We cite the following as some of the many authorities bearing upon the question: *Holt v. Alloway*, 2 Blackf. 108; *Anderson v. Fry*, 6 Ind. 76; *Westcott v. Brown*, 13 Ind. 83; *Teter v. Teter*, 88 Ind. 494; *Ault v. Zehering*, 38 Ind. 429; *Wetherill v. Stillman*, 65 Pa. St. 105; *Redman v. Gould*, 7 Blackf. 361. Mere formal irregularities will be no ground for rejecting a duly certified record of a judgment of another State. *Taylor v. Heitz*, 87 Mo. 660; 1 Wharton Ev., sections 97, 808; *Sears v. Dacey*, 122 Mass. 388; 1 Greenleaf Ev., sections 505, 506; Freeman Judg., section 565.

There was no evidence offered tending to prove the second paragraph of the appellant's answer.

Judgment affirmed, with costs.

Filed May 16, 1889.

119	109
127	12
119	109
143	250
142	328
119	109
162	380

No. 13,912.

JOHNSON v. CONKLIN.

**PLEADING.—Amendment.—Waiver of Exceptions.**—Where a defendant, after a demurrer has been sustained to his answer, obtains leave to amend, and files another answer, he thereby waives the exceptions taken on the original pleading.

**PROMISSORY NOTE.—Real Party in Interest.—Estoppel.**—The maker of a promissory note is estopped from showing that the payee was not the real party in interest at the time the note was executed.

From the Martin Circuit Court.

*J. T. Rogers*, for appellant.

*E. Moser* and *H. Q. Houghton*, for appellee.

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Johnson v. Conklin.

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ELLIOTT, C. J.—The plaintiff, Maria Conklin, brought this action to recover the amount evidenced by a promissory note executed to her as payee by the appellant. The trial court sustained demurrers to several paragraphs of the answer filed by the appellant, and he thereupon asked and obtained leave to amend. He subsequently filed several paragraphs of answer, to which the plaintiff replied. He here complains of the ruling on the demurrers to the original answer. His complaint is unavailing. *Prima facie*, the answers last filed were amendments of the original pleading, and that pleading went out of the case when the last answers were filed. By filing the answers after the leave to amend was obtained, the exceptions taken on the original pleading were waived. *Hunter v. Pfeiffer*, 108 Ind. 197.

But if we should consider the original answer as properly in the record, and the exceptions as available, it would not change the result, for the answer is bad. It seeks to show that the payee of the note was not the real party in interest at the time the note was executed, and this the maker of a promissory note is estopped from doing. *Blacker v. Dunbar*, 108 Ind. 217 ; *Wells v. Sutton*, 85 Ind. 70 ; *Rogers v. Place*, 29 Ind. 577 ; *French v. Blanchard*, 16 Ind. 143.

Judgment affirmed, with ten per centum damages.

Filed May 17, 1889.

Louisville, New Albany and Chicago R'y Co. v. Goodykoontz, Guardian.

No. 13,659.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. GOODYKOONTZ, GUARDIAN.

INFANT.—*Wrongful Death of.—Damages.—Right of Action.—Guardian.—Parent.*—A guardian has no right of action for the wrongful death of his infant ward, except to reimburse the ward's estate for expenditures which he has been required to make for care and medical attendance and funeral expenses, the right of action for general damages for loss of services, etc., being in the father or mother. Section 266, R. S. 1881.

From the Marion Superior Court.

*G. W. Easley, T. L. Sullivan, A. Q. Jones, G. W. Friedley*  
and *G. R. Eldridge*, for appellant.

*L. Ritter* and *E. F. Ritter*, for appellee.

MITCHELL, J.—Goodykoontz, as guardian, complains of the appellant railroad company, and charges that the death of his ward, George Lowery, a minor under the age of twenty-one years, was instantaneously caused by the negligence and wrongful conduct of the company. The only averment upon the subject of damages is, that the ward left surviving him "a mother and sister, and next of kin, competent to share in the distribution of the personal estate of said deceased, to whom damages enure," and that by reason of the injury and death the ward's estate has been damaged in the sum of ten thousand dollars.

There was a special verdict, and a judgment for \$2,500.

It is conceded that the action was brought under section 266, R. S. 1881, which reads as follows: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an in-

119 111  
128 486

119 111  
141 444

119 111  
146 151

119 111  
150 71

152 88

119 111  
160 387

119 111  
161 109

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163 635

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Louisville, New Albany and Chicago R'y Co. v. Goodykoontz, Guardian.

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jury to his ward, the damages shall enure to the benefit of his ward."

It was a settled rule of the common law that no one could maintain a civil action for damages on account of the death of a human being. All claims for injuries to the person were extinguished by the death of the person injured. *Actio personalis moritur cum persona*. If a child was wrongfully injured, the father, or person lawfully entitled to the child's services, might recover for the loss of services during the period of disability up to the time of death, if death resulted. Incidental damages for nursing, surgical and medical attendance, including appropriate funeral expenses in case of death, were also recoverable by a parent.

The statute above set out has added to the common law remedy of a parent the right to recover all the probable pecuniary loss resulting from the death of a child. The right of action is primarily in the father, but contingently in the mother ; and, whether there be a guardian or not, the father, or, under certain contingencies, the mother, may maintain an action under the above section. In estimating the damages, the value of the child's services from the date of the injury until he would have attained his majority, including the cost of nursing, medical and surgical attendance occasioned by the injury, together with necessary funeral expenses if death resulted, are to be considered. *Pennsylvania Co. v. Lilly*, 73 Ind. 252 ; *Mayhew v. Burns*, 103 Ind. 328 ; *Rains v. St. Louis, etc., R. W. Co.*, 71 Mo. 164 ; *McGovern v. New York, etc., R. R. Co.*, 67 N. Y. 417 ; 2 Thomp. Neg. 1292 ; 2 Wait Ac. and Def. 477 ; *Shearman and Redf. Neg.* (3d ed.), sec. 608.

The foregoing are the elements which enter into and presumably comprise the sum of the pecuniary loss sustained by a parent in case of the injury or death of his child, and whether the child was under guardianship or not, the right of action to recover this pecuniary loss is in the parent to whom the child owed service, and from whom he was en-

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Louisville, New Albany and Chicago R'y Co. v. Goodykoontz, Guardian.

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titled to receive support. While either the father or mother is alive, unless they have relinquished their right, respectively, to the services of the child by emancipation or otherwise, and have abdicated their duty to furnish him support, no one else is entitled to maintain an action for the loss of his services during minority, because the injury is to the person entitled to the child's services, and not to the minor's estate. *Walters v. Chicago, etc., R. R. Co.*, 36 Iowa, 458; *Cooley Torts*, p. 314 *et seq.*

If a minor under guardianship sustains an injury to his person from the wrongful conduct of another, his guardian may maintain an action and recover for the benefit of the ward, precisely as the latter might have recovered through the intervention of a *prochein ami*, in case he had not been under guardianship. This is so whether the ward's father or mother be living or not. The pain and suffering endured, and the permanent injury resulting from the wounding or maiming of a minor, are personal to himself, and damages for such pain and injuries are always recoverable for his benefit. We know of no principle or precedent which sustains a recovery of damages for the death of a human being, no matter how caused, simply for the purpose of enhancing the value of the decedent's estate. The action is given to afford compensation for those who have sustained pecuniary loss by the death, and not for the benefit of the decedent's estate. Doubtless, a guardian who has been required to make expenditures for care and medical attendance or for funeral expenses, out of his ward's personal property, may maintain an action against a wrongdoer to reimburse the estate, but surely he can not recover general damages for the death of the ward for the benefit of his estate, no matter who inherit as his heirs. Damages can not be recovered for the death of a human being, except by or for the benefit of those who are supposed to have sustained a sensible and appreciable pecuniary loss therefrom. Pecuniary loss, not to

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Louisville, New Albany and Chicago R'y Co. v. Goodykoontz, Guardian.

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the estate of the deceased person, but to those who had a reasonable expectation of pecuniary benefit, as of right, or of duty, or from a recognized sense of obligation, from the continuance of the life, is the foundation of the action. *Franklin v. South Eastern R. W. Co.*, 3 H. & N. 211; *Dalton v. South Eastern R. W. Co.*, 4 C. B. N. S. 296; *Pennsylvania R. R. Co. v. Adams*, 55 Pa. St. 499; *Mayhew v. Burns*, *supra*; *North Pennsylvania R. R. Co. v. Kirk*, 90 Pa. St. 15. It is the injury to the survivors entitled to sue, and not the value of the life lost, that forms the basis of damages. *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318.

Under section 266, only persons having a reasonable expectation of pecuniary benefit, as of right, duty or obligation, in some sense, from the continuance of the life, are entitled to maintain the action, unless possibly under exceptional circumstances, clearly showing appreciable pecuniary loss. Section 284, which gives a right of action to the personal representatives for the exclusive benefit of the widow and children, or next of kin, is entirely disconnected from section 266, and exerts no sort of influence upon the construction of, or rights conferred under, the latter section. *Mayhew v. Burns*, *supra*. The two are not to be confused or confounded with each other, but each is to be construed independently of the other.

Where the death of a minor has been wrongfully caused, the parent may maintain an action to recover the probable pecuniary loss sustained. The guardian, if there be one, may, no action having been brought by the parent, maintain an action to reimburse the personal estate of the ward for any actual loss. Section 266. If the death of any one is caused in like manner, an action may be maintained by his personal representatives, provided the person whose death has been caused left a wife or children, or next of kin, who had any appreciable pecuniary interest in the continuance of his life. Section 284; *Mayhew v. Burns*, *supra*, and cases cited.

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 Ryan v. Hurley.
 

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It appears from the complaint in the present case, that the ward whose death gave rise to the action was a minor, and that his mother was alive at the time the suit was commenced. Presumably she was, and is yet, unless barred by lapse of time, entitled to maintain an action to recover for the loss of her son's services. Death was instantaneous, and it does not appear that the guardian paid anything out of the ward's personal estate for funeral expenses. Hence the complaint shows no right of action in the guardian.

The judgment is therefore reversed, with costs.

Filed May 18, 1889.

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 No. 13,732.

## RYAN v. HURLEY.

**CONVERSION.—Damages.—Complaint.**—A complaint alleging the conversion by the defendant of property of a given value belonging to the plaintiff, shows that the latter is damaged to the value of the property, without a specific allegation to that effect.

**SAME.—Insufficient Complaint.**—A complaint for conversion which fails to allege either that the property converted was of any value, or that the plaintiff sustained any damage by reason of the conversion, is bad.

**PRACTICE.—Judgment upon Complaint Containing Bad Paragraph.—Supreme Court.**—Where judgment has been given for the plaintiff generally, without showing upon what paragraph of his complaint, error in overruling a demurrer to a bad paragraph will cause the reversal of the judgment, as the Supreme Court will not look to the evidence to determine whether or not injury resulted from the ruling.

From the Madison Circuit Court.

*W. A. Kittinger, L. M. Schwinn and E. B. McMahan*, for appellant.

*G. M. Ballard and C. M. Greenlee*, for appellee.

119	115
158	92
119	115
162	34
119	115
167	280
119	115
1171	316

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Ryan v. Hurley.

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OLDS, J.—This is an action for the value of personal property alleged to have been owned by the appellee, the plaintiff below, and converted by the appellant, the defendant below, to his own use. The complaint is in three paragraphs. Separate demurrers were filed to each paragraph of the complaint and overruled, and exceptions reserved, and the rulings on the demurrers are assigned as errors. There was an answer filed, cause put at issue and tried by the court, and a general finding in favor of the plaintiff for eighty-five dollars, and judgment in his favor for said amount.

The first paragraph of the complaint alleges, substantially, that on the 4th day of January, 1886, the plaintiff was the owner of one horse, of the value of \$125, and that on the said day the defendant wrongfully took and converted said horse to his own use. Prayer for judgment for one hundred and twenty-five dollars. The objection urged to this paragraph is that it does not aver that the conversion was to the damage of the plaintiff. We think this paragraph sufficient. It is proper and better pleading to aver that the conversion is to the damage of the alleged owner; yet the material averments are the ownership, the value and conversion of the property. It is presumable, and properly inferable, from the allegations of ownership by the plaintiff, the value of the property and the conversion by the defendant, that the plaintiff is damaged to the amount of the value of the property. Gould Pleading, 5th ed., p. 140, section 166.

It is alleged in the second paragraph that the plaintiff was the owner of a certain horse on the 4th day of January, 1886; that the defendant obtained possession of the horse and converted it to his own use; but it is not averred that the horse was of any value, or that the plaintiff sustained any damage by reason of such conversion.

The second paragraph is clearly bad. It is contended that the case was fairly tried, and that the appellant sustained no injury by the ruling of the court on the demurrer to the second paragraph of the complaint, even if it is defective, as



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there was a good paragraph of complaint. The finding of the court is general, and it can not be determined from the finding whether it is based upon the good or bad paragraph. It has been repeatedly held by this court that we can not look into the evidence and be governed by it in affirming or reversing a judgment for error committed in ruling on a demurrer to a complaint. The complaint must stand on its own merits, and if there is error in overruling a demurrer to it the case must be reversed. We can not look into the evidence to determine whether injury did or did not result from such error. *Pennsylvania Co. v. Poor*, 103 Ind. 553; *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Belt R. R., etc., Co. v. Mann*, 107 Ind. 89.

The third paragraph, like the first and second, is very unskillfully drawn, but we think it contains sufficient averments to constitute a good paragraph, and do not deem it proper to state at length the averments, as they are similar to the second, except that it avers the value of the horse.

Some other errors are assigned, but as the judgment will have to be reversed for the error in overruling the demurrer to the second paragraph of the complaint, and the other questions may not arise upon another trial of the cause, we do not deem it necessary to consider them.

Judgment reversed, at the costs of the appellee.

Filed May 17, 1889.

No. 14,612.

## KAHLENBECK v. THE STATE.

**CRIMINAL LAW.—Murder.—Indictment.**—For an indictment for murder, which is held to be good, see opinion.

**SAME.—Evidence.—Declarations of Accused Prior to Homicide.**—Where, upon the arrest of one charged with the murder of a peddler, articles of merchandise corresponding with those in the possession of the deceased shortly before his death are found in the accused's trunk, declarations of the latter, prior to the murder, that he had bought articles of that kind from a peddler, are not competent.

**SAME.—Evidence of Character.—Admissibility of.**—A party charged with crime in this State, who undertakes to introduce evidence of his character, must be confined to the particular trait of character involved in the charge against him; so, in a prosecution for murder, the general reputation of the accused for peace and quietude may be shown, but his reputation for morality may not.

**SAME.—Order of Introducing Evidence.—Discretion of Trial Court.**—It is within the discretion of the trial court to permit the State, after the defendant has begun to introduce his evidence, to introduce material evidence for the prosecution, although it is properly matter in chief, the defendant being given full opportunity to meet it.

**SAME.—Abuse of Discretion.—Reversal of Judgment.**—The court may, in its discretion, in all cases, admit original testimony, even after the evidence has closed, and the cause will not be reversed for that reason, unless it clearly appears that there was an abuse of discretion.

From the Huntington Circuit Court.

*J. B. Kenner* and *J. I. Dille*, for appellant.

*L. T. Michener*, Attorney General, *J. H. Gillett*, *E. C. Vaughn*, *J. C. Branyan*, *B. M. Cobb*, *C. W. Watkins* and *W. A. Branyan*, for the State.

**COFFEY, J.**—At the January term, 1888, of the Huntington Circuit Court, the appellant, Jacob Kahlenbeck, was indicted for the murder of Theodore Luntz. Upon a trial had at the April term of said court, the defendant was found guilty as charged, and sentenced to imprisonment in the

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State prison during life. He appeals to this court and assigns for error :

1st. That the indictment in this cause does not charge a public offence.

2d. That the circuit court erred in overruling the motion of the appellant in arrest of judgment, for the reason that neither count of the indictment states a public offence.

3d. That the circuit court erred in overruling the appellant's motion for a new trial.

As the first two assignments of error present the same question, it is not improper to consider them together. The indictment is in two counts, the first count charging, in substance, that, at the county of Huntington, in the State of Indiana, one Jacob Kahlenbeck, late of said county, on the 10th day of February, 1888, did then and there unlawfully, feloniously, purposely and with premeditated malice, kill and murder one Theodore Luntz, by then and there feloniously, purposely and with premeditated malice, shooting at and against, and thereby mortally wounding, the said Theodore Luntz with a certain deadly weapon, commonly called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said Jacob Kahlenbeck, then and there had and held in his hands, of which mortal wound he, the said Theodore Luntz, then and there instantly died.

The second count charges that, at the county and State aforesaid, on the day and year aforesaid, Jacob Kahlenbeck did then and there unlawfully, feloniously, purposely and with premeditated malice, kill and murder one Theodore Luntz, by then and there feloniously, purposely and with premeditated malice, shooting at and against, and thereby mortally wounding, the said Theodore Luntz, with a certain deadly weapon, to wit, a gun, then and there loaded with gunpowder and leaden ball, which said gun he, the said Jacob Kahlenbeck, then and there had and held in his hands, of which mortal wound the said Theodore Luntz then and there instantly died.

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No specific objection to this indictment is pointed out, and we are unable to discover in it any defect. In our opinion the indictment is good, and the court did not, therefore, err in overruling the motion in arrest of judgment.

Many reasons for a new trial were assigned, but we shall notice only those urged in the brief of counsel, filed in this court, as under the rules all others are to be deemed waived.

The defendant, on the trial of the cause, called one Mrs. John Gusman, and offered to prove by her that, on the 25th day of January, 1888, she heard the defendant say that he bought three table-cloths of a peddler for two dollars and a half.

The evidence on the part of the prosecution tended to show that the deceased was engaged in the business of peddling merchandise, and among other merchandise he was engaged in selling table-cloths. Some table-cloths were found in the trunk of the appellant, at the time of his arrest, which corresponded with the description of those known to be in the possession of the deceased shortly before he was killed.

The testimony offered by the appellant was intended to explain how he came into the possession of the table-cloths found in his trunk.

We do not think it was admissible. It consisted in the mere declaration of the appellant, unaccompanied by any act, and did not tend to explain any act that occurred at the time the declaration was made. It could not be any part of the *res gestæ*, and was mere hearsay. The court did not err in excluding it. *Spittorff v. State*, 108 Ind. 171.

The appellant called Henry W. Rosebrough and proved by him that he was acquainted with his general reputation, in the neighborhood where he resided, for morality. He then asked the said witness this question: "Is that character good or bad?" Upon objection made by the State, the witness was not allowed to answer the question, and appellant excepted.

In the case of *Walker v. State*, 102 Ind. 502, the defend-

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ant was prosecuted for the murder of one Shaw. It was held that the defendant might prove his general character for peace and quietude, but that his previous moral character was not a proper subject of inquiry. In the case of *State v. Bloom*, 68 Ind. 54, the question now under consideration was very fully considered. In that case the defendant was prosecuted for larceny, and it was there held that where a defendant, in a criminal case, introduces evidence of his good character as a defence, the evidence should be limited to the particular trait of character having relevancy to the crime charged. In that case it was held the defendant should have been confined to evidence of her character for honesty, and that her general character for morality was not material.

It seems to be settled law in this State, from the authorities above cited, that a party charged with crime in this State, who undertakes to introduce evidence of his character, must be confined to the particular trait of character involved in the charge against him. In this case the defendant was properly confined to proof of his good character for peace and quietude.

While the appellant was engaged in introducing his evidence, and before it was closed, counsel for the State announced to the court that the State had some evidence which was properly matter in chief. The State then offered to prove by Jacob Allis that he heard the defendant say to the deceased, before they started out of town, "We will work these houses around here awhile, and make some sales, and then we will go to the country, where we can do some good business." Counsel stated that they did not hear of this testimony until after they had rested their case. The court, over the objection of the appellant, permitted the State to introduce this evidence, to which he excepted.

The evidence on behalf of the State tended to show that on the morning of the 10th day of February, 1888, the appellant and the deceased left the city of Huntington, going in a westerly direction. The theory of the State is, that the

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deceased was decoyed into the woods by the appellant, where his body was found, with the view of committing the crime charged ; while on the other hand, the theory of the defence is, that when the appellant and the deceased went west on the morning of the 10th of February, the appellant was on his way to visit his father, and that the deceased went in that direction with him without the solicitation of the appellant. Under these circumstances we think it was in the discretion of the court to admit this evidence at the time it was admitted. *Trees v. Eakin*, 9 Ind. 554 ; *State, ex rel., v. Parker*, 33 Ind. 285 ; *Holmes v. Hinkle*, 63 Ind. 518 ; *Perrill v. Nichols*, 89 Ind. 444.

The record discloses the fact that the court announced to the parties that the introduction of this evidence would open the whole case, so that the opportunity of the appellant to meet it was as ample as if the State had introduced it before the close of its evidence in chief.

After the appellant had rested his case, and when the State was introducing its testimony in rebuttal, it called Christ. Winkleman, P. Gelschleighter and Mrs. Gelschleighter, and, over the objection of the appellant, proved by them, substantially, that on the evening of the 10th day of February, about four o'clock, they saw the appellant coming into Huntington from the west, by a private way, carrying a gun and a basket, with something in it covered up. This evidence was objected to by the appellant on the ground that it was evidence in chief, and not rebutting ; but the court overruled the objection, and it was admitted.

There are two roads running west from the city of Huntington, one known as the Flax Mill road, and the other as the Maple Grove pike. The body of the deceased was found in a woods between these roads.

On the 10th day of February, 1888, the appellant visited his father, who resided some distance west of where the body was found, on the Flax Mill road. The appellant introduced some evidence tending to show that he returned home from

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his father's by way of the Maple Grove pike. The State contended that appellant, in the forenoon of the 10th of February, decoyed the deceased into the woods where the body was found, murdered him, and then went on to his father's house; that there he procured a basket and returned to the body, robbed it, putting the goods into the basket, and returned home through the woods and by-ways between the two roads; the point at which he was seen, about four o'clock on that day, was between the two roads.

This evidence might well have been admitted in chief, and yet it is not wholly without the character of rebutting testimony. It tended to rebut the testimony introduced by the appellant to the effect that he had returned from his father's house, on that day, by the Maple Grove pike. Conceding, however, that it was original testimony, still it was in the discretion of the trial court to admit it. The court, in its discretion, may, in all cases, admit original testimony, even after the evidence has closed, and the cause will not be reversed for that reason, unless it clearly appear that such discretion was abused. *State, ex rel., v. Parker, supra; Holmes v. Hinkle, supra.*

In this case no time was asked by the appellant to procure evidence to meet that introduced by the State on this subject, but he was content to object and except to its introduction. We do not think the record discloses any abuse of discretion in admitting this evidence.

The appellant also asked a new trial on account of newly discovered evidence; but we do not think the evidence claimed to have been discovered was of a character to warrant the court in granting a new trial.

The appellant also claims that the evidence is not sufficient to support the verdict of the jury. We have read the evidence in the cause carefully, and while it is purely circumstantial, we think it tends strongly to support the verdict of the jury. We do not feel warranted in disturbing the verdict on the evidence.

The Louisville, New Albany and Chicago Railway Company v. Beck.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed May 16, 1889.

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No. 13,424.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. BECK.

RAILROAD.—*Right of Way.*—*Injunction.*—*Ejectment.*—*Estoppel.*—*Assessment of Damages.*—A land-owner who stands by, without demanding compensation, until a railroad is in operation and the public interests are involved, can neither enjoin the company nor maintain ejectment proceedings, his only remedy being a proceeding for the assessment of damages.

From the Carroll Circuit Court.

G. W. Easley and G. R. Eldridge, for appellant.

L. G. Beck and L. D. Boyd, for appellee.

MITCHELL, J.—This action was brought against the appellant railroad company by Beck, the owner of a lot in the city of Delphi, to recover so much of the lot as is occupied by the railroad company with its track and right of way, over and upon which it is conducting its business as a common carrier.

This case is directly within the principles which ruled in *Louisville, etc., R. W. Co. v. Soltwedde*, 116 Ind. 257, *Bravard v. Cincinnati, etc., R. R. Co.*, 115 Ind. 1, *Sherlock v. Louisville, etc., R. W. Co.*, 115 Ind. 22 (30), *Midland R. W. Co. v. Smith*, 113 Ind. 233, *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581, and other cases.

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169	146



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These cases declare the general rule, that a land-owner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the land-owner, in such a case, is to proceed within the proper time to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principles of public policy, as well as upon the provisions of section 3953, R. S. 1881.

The judgment is reversed, with costs.

Filed May 17, 1889.

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No. 12,571.

SWOPE ET AL. v. HOPKINS.

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**LANDLORD AND TENANT.**—*Year to Year Tenancy.*—*Conveyance of Leased Premises.*—*Rights of Grantee*—A tenancy from year to year is not changed by a conveyance of the real estate by the lessor, and the grantee may terminate it by proper notice and recover possession, the same as his grantor might have done.

From the Boone Circuit Court.

*C. S. Wesner* and *O. D. Wesner*, for appellants.

*F. M. Charlton* and *T. W. Lockhart*, for appellee.

**OLDS, J.**—This was an action between landlord and tenant for the possession of real estate. The only question presented is as to the sufficiency of the evidence to support the verdict. The evidence shows that one Liston P. Hopkins,

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brother of the appellee, was the owner of the real estate in question, and that, on the 9th day of January, 1884, he leased the same to the appellants for an indefinite period, at ten dollars per month, and they took possession of the same; that soon afterwards said Liston P. Hopkins sold and conveyed the real estate to the appellee, and the appellants recognized the appellee as their landlord and paid him rent. On the 8th day of October, 1884, the appellee served written notice on appellants, as prescribed by statute, to vacate the premises and surrender possession of the same to him at the expiration of the current year, and, on February 2d, 1885, this suit was brought for the possession.

This was a general tenancy, whereby the premises were occupied by appellants by the consent of the landlord, and constituted a tenancy from year to year, and the current year expired one year from the commencement of the occupancy by the consent of the landlord, which was January 9th, 1884. By the sale and conveyance of the real estate to appellee, and the recognition of such sale and payment of the rents by appellants to the appellee, the appellants became the tenants of the appellee, but it did not change the nature of the tenancy or give to the tenants any greater rights than they otherwise had. There can be no difference in this tenancy and any other in this respect. If Liston P. Hopkins had leased the real estate for one year, and afterwards, within the year, sold and conveyed the real estate to the appellee, whereby the appellants became tenants of the appellee, it certainly would not be contended that the lease was extended, or that the lessees would have any greater right, by reason of such sale. The rights of the lessees remain the same; the sale of the real estate did not add to or take anything from the tenancy. *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *Lennen v. Lennen*, 87 Ind. 130.

There was evidence to support the verdict.

Judgment affirmed, with costs.

Filed May 18, 1889.

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Kellar *et al.* v. Carr.

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No. 13,743.

## KELLAR ET AL. v. CARR.

**REPLEVIN BOND.**—*Action upon.*—*Complaint.*—*Defect of Parties.*—Where a complaint upon a replevin bond by one of two obligees alleges that the obligee who is not joined as plaintiff has no interest in the action, a demurrer for defect of parties plaintiff is not well taken.

**SAME.**—*Costs.*—*Right to Recover.*—In an action upon a replevin bond the plaintiff is entitled to recover the costs made by him and for which he became liable in the replevin proceedings, but he is not entitled to recover the costs made by the adverse party.

**SAME.**—*Recovery Limited by Penalty.*—The recovery upon a replevin bond can not exceed the penalty of the bond, and a judgment for more is erroneous.

From the Madison Circuit Court.

*A. Ellison*, for appellants.

*R. Lake*, for appellee.

**COFFEY, J.**—This was an action in the circuit court of Madison county upon a replevin bond executed in the usual form, before a justice of the peace. The breaches alleged are that the obligors in said bond failed to return the property replevied, though judgment of return had been awarded, and that said obligors failed and neglected to pay the costs in said replevin suit. The bond is made payable to the appellee and one Franklin Pence, and is in the penal sum of eighty dollars. The suit is prosecuted in the name of the appellee alone, the complaint averring that Pence has no interest in the suit.

The appellants filed a demurrer to the complaint, alleging for cause: 1st. There is a defect of parties plaintiff, in this, that Franklin Pence is a necessary party plaintiff, and should be joined. 2d. The complaint does not state facts sufficient to constitute a cause of action.

The demurrer was overruled and appellants excepted. A

trial by the court resulted in a finding and judgment for the appellee in the sum of \$86.34.

The appellants assign as error: 1st. That the circuit court erred in overruling their demurrer to the complaint. 2d. That said court erred in overruling the motion for a new trial.

The first cause of demurrer assigned is, that there is a defect of parties plaintiff, in that Franklin Pence should be joined. Were it not for the allegation in the complaint that Pence has no interest in the controversy, this demurrer would be well taken, but as all suits are to be prosecuted in the name of the real party in interest, if he, in fact, has no interest in said bond, he should not be required to join and incur the expense of prosecuting a suit. As the bond, however, is made payable to him, if he has no interest in it he should have been made a party defendant, to the end that he might be estopped by the judgment rendered in said cause. But no objection is made to the complaint on account of the failure to make Pence a party defendant. We are of the opinion that the court did not err in overruling the demurrer of the appellants on account of a defect of parties plaintiff.

The complaint states a cause of action for a failure to return the property replevied, according to the conditions of the bond and the judgment of the court.

The principal reason urged for a new trial was, that the court erred in the assessment of the damages, the amount assessed being too large.

The value of the property involved in the replevin suit was ascertained, in that case, to be \$27. To this sum the court added the costs in the suit in which the bond was executed. It is contended by the appellants that the costs recovered in the replevin suit are not recoverable in a suit on the bond.

Morris on Replevin (3d ed.), page 286, says, in speaking of replevin bonds: "Damages may be recovered against the sureties to the amount of the penalty in the bond for the value of the property, and for the damages found in favor

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of the defendant, and for costs." See, also, *Tibbles v. O'Connor*, 28 Barb. 538.

In actions on replevin bonds, the damages assessed should be compensatory. By the common law, the makers of the bond were liable for the full amount of the penalty of the bond, but in case of hardship chancery frequently interposed relief. The terms upon which relief was granted were the payment of all damages and costs. Wells Replev., section 457.

Instead of recovering the full amount of the penalty in such bonds, under modern statutes the defendant recovers only such sum as will compensate him for the loss he sustains by reason of being wrongfully sued and deprived of the use of his property. Such recovery, in our opinion, should include the costs he was compelled to expend in and about his defence of the suit, and the taxation of which has been made pursuant to the judgment of the court. This is, in fact, a part of his damages recovered in the action. But the defendant in such case is not entitled to recover judgment for the costs made by the plaintiff. He is entitled to recover only such costs as he made and for the payment of which he became liable. In this case it appears that the appellee recovered all the costs in the replevin suit. This was error. Furthermore, the penalty in the bond is \$80 only, while the judgment is \$86.34. The recovery could not exceed the penalty in the bond. Morris Replev. (3d ed.), p. 289. The motion for a new trial should have been sustained.

Judgment reversed, at the costs of the appellee, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed May 18, 1889.

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Moon *et al.* v. Jennings *et al.*


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No. 13,673.

## MOON ET AL. v. JENNINGS ET AL.

**TENANTS IN COMMON.—*Liens.—Contribution.***—Where one tenant in common pays off a lien existing against the joint property, he is entitled to contribution from his co-tenants to the extent of their interests, and to secure such contribution a court of equity will enforce upon the interests of the co-tenants an equitable lien of the same character as that removed.

**SAME.—*Quieting Title.***—A tenant in common is not entitled to have his title quieted as against his co-tenant, where the latter holds certificates of purchase issued by the sheriff upon a sale of the joint property under the foreclosure of a mechanic's lien thereon, as the latter is entitled to contribution.

**JUDGMENT.—*Relief From.—Surprise and Excusable Neglect.—Meritorious Defence.***—A complaint under section 396, R. S. 1881, by a tenant in common, to be relieved from a judgment by default, quieting his co-tenant's title, which shows that the plaintiff was misled as to the character of the action by the manner in which the complaint was prepared, and by the representations of the defendant's counsel as to the kind of relief sought, and by the violation of an agreement to dismiss upon complying with a certain condition, and showing, as a defence to the action, that the plaintiff has paid liens against the joint property, upon which he is entitled to a contribution lien, is good.

**PRACTICE.—*New Trial.—Separate Motions For.***—A party filing a motion for a new trial must include all the grounds upon which he relies in one motion; they can not be separated and a separate motion filed for each cause assigned.

From the Howard Circuit Court.

*B. C. Moon*, for appellants.

*C. N. Pollard*, for appellees.

**OLDS, J.**—This is an application on behalf of appellees, under section 396, R. S. 1881, to be relieved from a judgment taken against them by appellants.

The complaint alleges that the defendants, the appellants, did, on the 5th day of January, 1886, file in the office of the clerk of the Howard Circuit Court a complaint, in two par-

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agraphs, against the appellees, setting out a copy of the complaint and the judgment rendered in said cause. The first paragraph of the complaint was for the redemption from a sale of certain real estate, owned by appellants and appellees as tenants in common, and which had been sold on foreclosure of a mortgage executed by their grantors, and the certificate of sale issued by the sheriff making the sale was held by the appellees. The second paragraph was a paragraph alleging ownership of the undivided one-half of the real estate by appellants, and that appellees claimed an interest in the same, and asking for a judgment quieting title; and it is averred that the second paragraph was so inserted within the sheets of paper upon which the complaint was written that the first paragraph could and would be taken by a person of reasonable prudence and care to constitute the whole of said complaint; that the first paragraph was not numbered, and there was nothing to indicate, to the keenest observer, that there was a second paragraph; that the first paragraph was signed by the attorneys, and between the first and second paragraphs there intervened three pages of blank paper, upon which nothing appeared except the clerk's receipt for \$208, brought into court as a tender in connection with said first paragraph, for redemption of appellants' undivided one-half interest in said real estate; that appellees were served with process in said cause on the 6th day of January, 1886, to appear on the 16th day of January, 1886; that neither of appellees appeared, and, upon default, judgment was rendered against them in favor of appellants, quieting the title to said real estate in the appellants; that said judgment was rendered upon the said second paragraph of complaint, and had no relation to the averments contained in the first paragraph, and was not based or rendered thereon; that appellee Margaret E. Jennings was sick, and was thereby disabled and prevented from personally looking after or appearing to said cause, and so remained and continued sick until after the rendition of said judgment in said

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cause ; that she is unacquainted with legal proceedings, and of the nature and character of pleadings, and the only knowledge she had as to the nature and character of said action was such as she received from her husband, William L. Jennings ; that William L. Jennings made inquiry, in good faith, of one B. C. Moon, the leading attorney for appellants in said cause, as to the character of said action, on the 7th day of January, 1886, and was then and there informed by said Moon that the only intent and purpose of said action was to enforce the right of said Moon to redeem the one-half interest in said real estate from said sale on the foreclosure of said mortgage, as in said first paragraph of said complaint set forth ; that if said redemption money should be accepted by appellees, then said action would be dismissed at the costs of the appellants ; that said William L. Jennings went to the clerk's office and procured said complaint, then on file, and carefully read over the same, and, finding nothing but the first paragraph of the complaint, and relying upon the statements and promises of B. C. Moon, attorney for the appellants, the plaintiffs in said cause, that said complaint contained nothing but the matters pertaining to said redemption, and that the same would be dismissed if said redemption money was accepted, did then and there accept said redemption money, and gave the case no further attention, and returned home and informed his co-plaintiff, Margaret E. Jennings, of the matters stated by the said B. C. Moon, and what said complaint did contain, and that the intent and purpose of the action was only to redeem from said mortgage sale ; that she believed and relied upon said statements, and had no reason to suppose or believe that said action involved anything but the redemption from said mortgage sale, and appellees gave the case no further attention. That appellees did not know or learn of the true character of said judgment, taken in said cause, until June 16th, 1886 ; that ever since the 23d day of February, 1884, appellees, as husband and wife, have held and owned a one-half interest in said real



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estate, by warranty deed from Freeman and Freeman ; that at the commencement of said action appellees had and still have a complete and meritorious defence to said second paragraph of said complaint, in this, to wit: That on the 13th day of January, 1884, at the suit of Hunt and Hunt against one George W. Price and others, in the Howard Circuit Court, a valid judgment and decree of foreclosure of a mechanic's lien upon all of said real estate was rendered, for the sum of \$206.39, with all costs of suit ; that on the 18th day of November, 1884, a duly certified copy of said decree was issued and placed in the hands of the sheriff of said county, and said sheriff duly advertised and sold said real estate on the 10th day of January, 1885, to said Hunt and Hunt, for \$253.97, and said sheriff issued to said Hunt and Hunt a certificate of purchase therefor, they having paid the price so bid for the same ; that long before the commencement of said suit, these appellees, for a valuable consideration, became and were the legal owners of said certificate of purchase so issued by said sheriff to Hunt and Hunt, and have ever since owned and still own the same ; that neither said real estate, nor any part of the same, has been redeemed from said sale, and these appellees are the complete equitable owners of all of said real estate ; also, alleging another foreclosure of a mechanic's lien on all of said real estate, and a sale for \$133.46, and that a sheriff's certificate duly issued to the purchaser, and that the appellees became and were the legal owners of such certificate of purchase before the commencement of said action, and still are the owners of the same ; and they ask to have said default and judgment set aside, and that they be permitted to make their defence.

A demurrer was filed to the complaint and overruled, and exceptions reserved by appellants.

It is contended by counsel for appellants that the complaint does not show that appellees had any defence to the original action to quiet title ; that appellants and appellees are tenants in common, and the property of each liable for

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Moon *et al.* v. Jennings *et al.*

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the debt secured by the mechanic's lien, and that the payment by appellees extinguished the lien, and it could not be enforced by appellees against the interest of their co-tenants, the appellants, in the real estate. Numerous authorities are cited by counsel, which, it is contended, support this theory. We can not agree to this theory. It is true it has been so held in some cases of co-tenancy, where the tenancy was created by the same instrument or act, on the theory that such tenants occupied a confidential relation toward each other, and that the payment of the lien operated as an extinguishment and enured to the benefit of all the tenants; but the true rule, as upheld by the weight of authority, is, that where one tenant in common pays off a lien against the joint property, he is entitled to contribution from his co-tenants to the extent of their respective interests, and a court of equity, to secure such contribution, will enforce upon the interests of the co-tenants an equitable lien of the same character as that which has been removed; and especially is this true where the tenants in common derive their respective titles from a different source. *Titsworth v. Stout*, 49 Ill. 78 (95 Am. Dec. 577); *Fischer v. Eslaman*, 68 Ill. 78. 4 Kent Com. (12th ed.), p. 371, note c, cited by counsel, holds that a co-surety, having a counter-security, is bound to apply it to the benefit of his co-surety equally with himself, is not in conflict with the doctrine we have announced, but in support of the general principle of equity that they must deal justly with each other, that each co-tenant must share the benefits received and contribute to the outlay in the protection of the title. In the case of *Roberts v. Thorn*, 25 Tex. 728 (78 Am. Dec. 552), it is held that the rule that one of two tenants in common, who acquires a superior outstanding title, must hold it in trust for the other upon that other paying his proportion of the purchase-money, only applies when the interest accrues under the same instrument or act of the parties or the law, or when they have entered into some engagement or understanding with one another. *Rippetoe v. Dwyer*, 49 Texas, 498. To

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Moon *et al.* v. Jennings *et al.*

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the same effect is the case of *Elston v. Piggott*, 94 Ind. 14. Counsel also cites the case of *Klippel v. Shields*, 90 Ind. 81, holding that when one co-surety pays a judgment it extinguishes the judgment. We think this doctrine not in conflict with our theory of this case. It is no doubt the law that when one primarily liable for the payment of a judgment makes an unconditional payment of the same, in law it extinguishes and satisfies the judgment; but a different rule applies when one co-tenant pays off a lien against the joint estate or purchases an outstanding title to the estate. *Lowrey v. Byers*, 80 Ind. 443; *Eads v. Retherford*, 114 Ind. 273. In this case it appears from the original complaint to redeem from the mortgage, which is incorporated in the complaint in this case, and it is admitted by counsel, that the appellees and appellants do not derive their title by the same instrument. It appears from the complaint that the land was sold on a valid judgment against the real estate, and that the appellees purchased and became the owners of the certificate of purchase, which entitled them to contribution from the appellants in proportion to their interest in the land, and the appellees had the right to enforce such contribution by having a lien declared against the interest of appellants in the land, and the appellants were not entitled to a judgment against the appellees quieting their title to said interest in said land while said claim remained unsatisfied. The complaint also shows an agreement between appellees and the attorney of the appellants that the case should be dismissed on the appellees accepting the amount due them by reason of having paid the mortgage lien, and they did accept said amount and rely upon such agreement, and did not appear to the action, and that the complaint in such case was in such form as that it would tend to mislead, and did mislead, the appellants as to the nature of the action. The complaint was sufficient.

It is also contended that the appellees were not entitled to the relief asked until they had tendered back the money re-

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*Moon et al. v. Jennings et al.*

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ceived. The money received had no connection with the relief asked. It was paid in satisfaction of another debt, viz., the amount paid by appellees for the appellants in satisfaction of appellants' share of a mortgage debt against their joint property.

It is contended that the judgment should be reversed for the reason that there is a variance between the averments of the complaint and the findings of the court. We do not think there is any material variance, such as to authorize the reversal of the judgment, and the finding is fairly supported by the evidence. Nor was there any error in proving what Mr. Bell, one of appellants' attorneys, said to appellee William L. Jennings on the subject of the dismissal of the case if he accepted the money in redemption of the land. It was proper for the purpose of determining whether the Jennings acted in good faith and had reason to believe the case was to be dismissed.

We do not consider the question as to the use of the complaint in evidence. Parties filing a motion for a new trial for errors occurring on the trial, must include all the grounds in one motion; they can not separate them and file a separate motion for each cause assigned, and we do not consider the error assigned on the overruling of the second motion for a new trial. There might be a case where a second motion for a new trial would be proper, but this is not such a one.

There is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Filed April 5, 1889.

#### ON PETITION FOR A REHEARING.

OLDS, J.—Counsel for appellants contends that there should be a rehearing granted in this case, for the reason that there was a misapprehension and misstatement of the counsel's position in the original opinion; and he contends that the complaint affirmatively shows that appellees and appellants de-

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*Moon et al. v. Jennings et al.*

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rived title to the real estate in question from the same grantor, who first sold and conveyed to the appellees the one-half of the real estate, and afterwards sold and conveyed to appellants the remaining one-half; that appellants have the right to have the appellees' share of said real estate applied to the payment of the liens upon the same, and that the said appellees' interest in said real estate was primarily liable for the payment of the liens which were paid off by appellees, and that therefore they cannot recover, and their complaint does not state facts sufficient to constitute a defence to the complaint of appellants to quiet their title.

Counsel is in error, both as to the misapprehension by the court of his position and as to the averments of the complaint in this action. The complaint avers ownership in the appellees of the undivided one-half of the real estate, that valid judgment liens had been recovered against all of said real estate, that the same had been sold thereon, and that certificates of purchase for all of said real estate had been issued, and appellees had purchased the same, and were the holders and owners of said certificates and the equitable owners of all of said real estate before the commencement of appellants' action to quiet title to said real estate. In the complaint they set out a copy of the complaint of appellants in the action to quiet title, and the judgment rendered in said cause, which they ask to have set aside. In their complaint it is alleged that one George W. Price was the owner of said lot, and upon the — day of —, he conveyed one-half to appellants, and after said conveyance, on the — day of —, he conveyed the other one-half to appellees, and that the grantees in said deeds respectively agreed that each should pay one-half of a certain mortgage then on said real estate. The allegations show that, in effect, said two conveyances were all one transaction; but the complaint, in this action, does not aver or admit the truth of the averments of the complaint in the action brought by appellants; nor does the finding of facts show that Price owned the real

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 Corcoran v. Corcoran.
 

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estate, and sold and conveyed to appellants and appellees each one-half, and that the sale and conveyance to appellees antedated the sale and conveyance to appellants.

It is further complained by counsel, that we did not set out in full the finding of facts which exonerated counsel from any wrong or unprofessional conduct on his part. This we did not, and do not now, deem necessary. The finding of facts fully exonerated counsel from any wrong or unprofessional conduct ; but we do not deem the motives which actuated counsel to be material in determining whether the default and judgment should be set aside, as asked in this case. The findings show a misunderstanding, and that appellees were misled, by reason of which they did not appear, and suffered default.

Petition for a rehearing overruled.

Filed May 18, 1889.



119	136
135	645

No. 12,410.

### CORCORAN v. CORCORAN.

**HUSBAND AND WIFE.**—*Conveyance by Husband to Wife.*—*Presumption as to Character of.*—A conveyance of property from a husband to his wife is presumably a voluntary settlement, or provision for her benefit, and if it is reasonable it will be upheld against the husband, unless obtained by fraud or undue influence.

**SAME.**—*Agreement by Wife to Support Husband.*—*Damages.*—A contract by a wife whereby she agrees, in consideration of a conveyance to her of real estate by her husband, to support the latter during his natural life, is void, and no cause of action for damages for a breach thereof can accrue to the husband.

From the Dearborn Circuit Court.

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Corcoran v. Corcoran.

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*C. S. Jelley, D. H. Stapp, G. M. Roberts and C. W. Stapp,*  
for appellant.

*L. T. Michener and J. H. Gillett,* for appellee.

MITCHELL, J.—This was an action by Martin Corcoran against his wife, Mary Corcoran, to recover damages for the alleged breach of an executory contract. The following are the material facts, as they appear in the complaint :

In January, 1871, the plaintiff was the owner of a house and lot in the city of Aurora, Indiana, which was of the alleged value of \$2,500, and of the rental value of \$200 per annum. He avers that his wife proposed to him that if he would convey the above mentioned property to her she would support and maintain him during his natural life, and that in consideration of the promise and agreement above mentioned he executed a warranty deed conveying the property to her in fee simple. After receiving the conveyance the defendant treated the plaintiff with great cruelty, compelled him to sleep on the floor, and otherwise mistreated him, so that he was constrained to seek shelter elsewhere. He avers in his complaint that since some time in the year 1879 the defendant has refused "to maintain, support or keep plaintiff, or to furnish any part or portion of his support, and still refuses so to do, so that plaintiff has been compelled to, and does, maintain and support himself, though in poor health." He charges that his maintenance and support are reasonably worth four dollars a week ; that he has sustained damage in the sum of \$1,500 on account of the default of his wife in the respects mentioned above, which sum he prays may be decreed to be a lien upon the land. The court rendered a personal judgment against the defendant, and entered a decree according to the above prayer. The complaint does not state facts sufficient to constitute a cause of action.

A conveyance of property from a husband to his wife is presumably a voluntary settlement, or provision for her benefit, and if it is reasonable it will be upheld against the hus-

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Corcoran v. Corcoran.

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band and his heirs, unless obtained by fraud or undue influence. 1 Bishop Law of Married Women, section 754; Harris Contracts Married Women, section 441.

While the conveyance above mentioned was, therefore, presumably valid and binding, the executory contract of the wife to support her husband was void. *Barnett v. Harshbarger*, 105 Ind. 410. The law makes it the duty of the husband not only to support himself, but his wife and children as well, and we know of no rule of law or of public policy which gives any countenance to an attempt by a husband to abdicate the duty which the law casts upon him, and impose it as an obligation upon his wife through the medium of an ordinary oral contract. *Harrell v. Harrell*, 117 Ind. 94; *Artman v. Ferguson*, 40 N. W. Rep. 907.

Under the enlightened policy of modern legislation, married women have been relieved of many common law disabilities, but we have not yet progressed so far as to enable a married woman to bind herself by contract with her husband to assume his obligation to furnish support for both. Contracts between husband and wife are void in law, and are only upheld, especially against the wife, when they are supported by the clearest and most satisfactory equity. It does not appear that the plaintiff was not abundantly able to support himself, or that the property conveyed to his wife was anything more than a reasonable provision for her. It affirmatively appears in the complaint that after the plaintiff's wife refused to abide by the contract, the plaintiff supported himself. The gravamen of his complaint is that he was obliged to earn his own support, notwithstanding the contract of his wife, by which he alleges he became exempt from that onerous burden for the remainder of his natural life. He claims that he ought now to be reimbursed at the rate of four dollars per week, by way of damages, because his wife refused to do for him that which he was able to do for himself.

The wrong complained of grows out of a relation which



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Burkett *et al.* v. Holeman.

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the plaintiff attempted to create with his wife by contract. The real injury complained of is that she refused to perform an agreement into which he had entered with her. The law will not permit a husband to enforce a contract indirectly by counting on the wife's refusal to perform it as a tort. Cooley Torts, 106; *Rice v. Boyer*, 108 Ind. 472.

True, it appears the plaintiff conveyed the house and lot to his wife. That afforded them a place to live, but one or the other must necessarily supply the means of support. It does not appear that either had any other means of furnishing support, except their ability to work. The plaintiff assumes that because he made the conveyance to his wife all concern about support in the future was at an end on his part, since his wife had undertaken to furnish it by contract. It does not appear that the wife had any means of obtaining support for herself, except by her own labor, and even if it did, we are aware of no principle or precedent which would sustain a judgment for damages in favor of a husband against his wife for the breach of an executory contract, and especially a contract of the anomalous character of the one in question. The case must be regarded precisely as if the husband had conveyed the property to his wife without any contract whatever, except so far as the contract may have operated as an inducement to the conveyance. The wife had no power to make such a contract, and the plaintiff acquired no equitable right through the void contract which a court of equity can recognize.

The judgment is reversed, with costs.

Filed May 14, 1889.

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No. 13,663.

BURKETT ET AL. v. HOLEMAN.

From the Marshall Circuit Court.

*G. W. Holman* and *M. R. Smith*, for appellants.

*J. Rowley* and *M. A. Baker*, for appellee.

ELLIOTT, C. J.—Affirmed on the authority of *Burkett v. Bowen*, 118 Ind. 379.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF INDIANA,**  
**AT INDIANAPOLIS, MAY TERM, 1889, IN THE SEVENTY-THIRD**  
**YEAR OF THE STATE.**

No. 13,250.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY**  
**COMPANY v. CAULEY ET AL.**

**PLEADING.—Negligence.—Facts Constituting.**—A failure to state, in detail, the facts constituting negligence, does not render a complaint bad on demurrer.

**INTERROGATORIES TO JURY.—What Improper.**—Interrogatories to the jury, which call for answers as to mere matters of evidence and not facts, are improper.

**FORMER RECOVERY.—Evidence.—Pleading.**—Where the only answer pleaded to the cause of action stated in one paragraph of complaint is a general denial, evidence of a former recovery under a plea addressed to another paragraph is not available.

From the Montgomery Circuit Court.

*G. W. Easley, G. W. Friedley, A. D. Thomas and G. R. Eldridge,* for appellant.

*G. W. Paul, J. E. Humphries and W. M. Reeves,* for appellees.

119	142
121	281
123	461
119	142
123	194
119	142
161	703
119	142
165	629

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The Louisville, New Albany and Chicago Railway Co. v. Cauley *et al.*

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ELLIOTT, C. J.—The appellees' complaint contains three paragraphs, all seeking to recover damages for property burned by fire escaping from the track or locomotives of the appellant. The appellant unsuccessfully demurred to each of the paragraphs.

The objection that all of the paragraphs are bad because they do not specifically state the facts constituting the negligence imputed to the appellant, is not valid. It has often been decided by our own and other courts, that a failure to state, in detail, the facts constituting negligence, does not render a pleading bad on demurrer. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196.

The interrogatories refused by the court were properly refused, because they called for answers as to mere matters of evidence. It is improper to ask interrogatories designed to elicit items of evidence, for the object of the statute is to obtain the facts, and not merely the evidence. The practice of propounding a great number of interrogatories has often been censured, and it is very doubtful whether, if many interrogatories are permitted, some proper and some improper, the court would not be justified in rejecting all instead of being compelled to select the good from the bad.

The jury allowed the appellees damages for injury to their land, but allowed them nothing for any other item in their complaint. It is, therefore, not material to inquire or decide whether there was or was not error in the instructions given upon other points, or in refusing instructions upon those points; but we think it proper to say that the instructions given by the court have been examined and found to be correct, and that we can not perceive that there was any material error committed in refusing those asked by the appellant. In so far as they expressed the law correctly, and were relevant to the case, they were fully embraced in those given by the court.

The plea of former recovery is addressed to the third paragraph of the complaint, and the first is the only one which

Gwaltney v. Gwaltney.

claims damages for an injury to the soil of the appellees ; so that the plea does not reach that claim. If the plea had been addressed to the whole complaint, and had shown that the damages resulted from a single tortious act, then the appellant would probably have been entitled to recover, on the evidence. *City of North Vernon v. Voegler*, 103 Ind. 314 ; *City of Lafayette v. Nagle*, 113 Ind. 425 ; *Crosby v. Jeroloman*, 37 Ind. 264.

But the only answer to the first paragraph of the complaint was the general denial, and as to the cause there declared on the evidence of a former recovery was not available.

We have given the evidence careful study, and, while impressed with the belief that the jury awarded the appellees more damages than we should have done, still we can not disturb the verdict, for it is sustained by the testimony of many witnesses.

Judgment affirmed.  
Filed May 27, 1889.

119	144
127	86
127	334
119	144
128	377
119	144
134	187
135	379
119	144
139	65
119	144
151	105
119	144
1153	64
119	144
154	423
154	424
155	145
119	144
168	549

No. 13,742.

GWALTNEY v. GWALTNEY.

INJUNCTION.—*Waste.—Descent.—Childless Second Wife.—Interest of, as Widow.*  
—As the only interest which a child by the first marriage of his father has in land set off to a childless second wife, upon the death of her husband, is a mere expectancy that he may inherit it from his stepmother in case he survives her, he can not maintain a suit to enjoin her from committing waste.

From the Gibson Circuit Court.  
*C. A. Buskirk* and *H. A. Yeager*, for appellant.  
*J. E. McCullough* and *J. H. Miller*, for appellee.

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Gwaltney v. Gwaltney.

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MITCHELL, J.—Amariah Gwaltney died intestate, in Gibson county, in January, 1885. He was the owner of a considerable body of real estate, and left, as his only heirs, Nancy Gwaltney, his childless widow, and James H. Gwaltney, his son by a former marriage. In a partition proceeding, to which the widow and son were parties, a tract of one hundred acres of the land of which the intestate died seized was set off to the widow. This was a proceeding instituted by the son to enjoin his stepmother from removing timber and committing waste upon the land so set off to her.

The question presented relates to the nature of the estate which the law casts upon a childless second wife, upon the death of her husband, in virtue of her marriage, and whether or not the husband's children by a former marriage have such an interest in the land which descends to her as entitles them to enjoin the widow from removing timber therefrom or committing waste thereon. It is scarcely necessary to say the present case is not affected by the act of the General Assembly which took effect March 11th, 1889. Acts of 1889, p. 430. Section 2483, R. S. 1881, and the proviso to section 2487, control the decision of both questions. These statutory provisions are to the effect that, upon the death of a husband leaving a widow, one-third of his real estate shall descend to her in fee simple; provided, that if a man marry a second or other subsequent wife, and has by her no child or children, but has a child or children alive by a previous wife, the land which at his death descends to such wife shall, at her death, descend to his children.

It is well established that a remainder-man, reversioner, or other person having an existing interest in land, may invoke the aid of a court of equity to restrain the commission of acts of waste, such as removing valuable timber from the freehold, where the timber constitutes an important element in the value of the land. Ordinarily a reversioner or remainder-man must have the legal title, or at least a

present existing vested right, in remainder or reversion, in order that he may maintain the action. *Wilson v. Galey*, 103 Ind. 237; *Gillett v. Treganza*, 13 Wis. 527; *Hughlett v. Harris*, 1 Del. Ch. 349 (12 Am. Dec. 104); *Miles v. Miles*, 32 N. H. 147 (64 Am. Dec. 362).

One thus seized of an estate, in remainder or reversion, may maintain an action for waste, or he may resort to a remedy by injunction in a court of equity for the staying of threatened acts of waste, notwithstanding the intervention of an estate for life or years. Section 287, R. S. 1884; *Robertson v. Meadors*, 73 Ind. 43, and cases cited.

The difficulty which confronts the appellant in the present case is, he is neither a remainder-man nor reversioner, nor has he any interest whatever in the land, except a mere expectancy that he may inherit it from his stepmother in case he survives her. Thus the statutes above mentioned have been construed again and again, until it must now be considered as settled.

The estate which a widow takes in the real estate of her husband is a fee simple, by the very words of the statute, which applies alike whether she be a first, second or subsequent wife. If, however, she have no children by the husband from whom she inherits the land, his children become, by compulsion of law, her heirs, in case they or their descendants survive her. While she lives they have no interest in the land. Accordingly, it has been repeatedly held that the husband's children are not bound by a judgment of a court ordering their supposed interest to be sold, nor by a conveyance made by them or by their guardian during the lifetime of the widow. *Erwin v. Garner*, 108 Ind. 488; *Thorp v. Hanes*, 107 Ind. 324; *Bryan v. Uland*, 101 Ind. 477, and cases cited.

The plaintiff occupies the attitude of an expectant heir, seeking to restrain the ancestor from committing waste upon an estate which the former may or may not inherit. We are

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Gwaltney v. Gwaltney.

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not advised of any principle or authority which supports such a proceeding.

It is contended that the estate created by the statute is, in fact, an estate for life, regardless of the name by which it is designated, and that the children by the first marriage are, in effect, remainder-men, notwithstanding the interpretation put upon the statute. This position is not in harmony with the current of our later decisions, nor is it consistent with any principle of correct legal interpretation. The statute not only designates the estate which descends to a widow upon the death of her husband a fee simple, but, notwithstanding its peculiarities, the estate possesses more of the incidents and characteristics of a fee simple than of an estate for life. It is true the law arbitrarily appoints the children of the deceased husband, if any there be alive at the death of the widow, as the heirs upon whom the estate shall be cast by descent. If, however, there are no children of the husband, or their descendants, the estate descends as in other cases. The manner in which real estate shall descend, and who shall inherit, are altogether matters of public policy, subject to be regulated by law. That the statute prescribes a peculiar line of descent in respect to lands descended to a childless widow, who was a second or subsequent wife, does not make her estate therein any the less an estate of inheritance. *Utterback v. Terhune*, 75 Ind. 363. Because the appellant had no vested interest or estate of any description in the land, he was not entitled to invoke the aid of the court to restrain the owner of the fee from removing timber.

Judgment affirmed, with costs.

Filed May 27, 1889.

119	148
123	252
119	148
149	369
119	148
154	324

No. 13,520.

## THE CITY OF SEYMOUR v. CUMMINS, ADMINISTRATRIX.

**DAMAGES.**—*Survival of Cause of Action.*—*Parties.*—A cause of action accruing to a person in his lifetime against a city for damages resulting from the construction of a ditch survives, and the administrator is the proper plaintiff.

**SAME.**—*City.*—*Drainage.*—*Nuisance.*—*Special Injury.*—Where a city constructs an open ditch upon a street, so near to a plaintiff's lot as to cause portions thereof to fall into the ditch, and so as to deprive him of access to his residence, and to affect the healthfulness of his property by causing filthy water and sewerage to become stagnant adjacent thereto, it is liable in damages.

**SAME.**—*Defective Plan.*—*Liability of City.*—If a city adopts a proper plan of drainage and lets a contract for the doing of the work, the contractor to use his own methods and means for the construction of the drain, the city is not liable for damages resulting from the contractor's negligence; but if the city adopts a defective plan, and the work is constructed according thereto and a special injury results to a property-owner by reason of negligence in devising the plan, the city is liable.

**SAME.**—*Damages Accrue to Owner of Real Estate at Time of Injury.*—*Subsequent Conveyance.*—*Effect upon Right of Action.*—In such case the damages accrue to the person who owns the property at the time of the injury, and his right to maintain an action therefor is not affected by the fact that he parts with the title to the real estate after the commencement of the action.

**SUPREME COURT.**—*Motions in Trial Court.*—*Saving Questions upon.*—*Bill of Exceptions.*—*Practice.*—No question is presented on appeal upon the overruling of motions to separate the causes of action stated in the complaint, and to make the complaint more specific, and to strike out parts thereof, unless saved by a bill of exceptions or by a proper record made at the time.

**PLEADING.**—*Answer.*—*Demurrer.*—There is no error in sustaining a demurrer to a paragraph of answer where the facts pleaded therein are admissible in evidence under the general denial, which is pleaded.

From the Jennings Circuit Court.

A. P. Charles and O. H. Montgomery, for appellant.

W. K. Marshall, for appellee.

OLDS, J.—This action was commenced by John J. Cum-



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The City of Seymour v. Cummins, Administratrix.

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mins, in his lifetime, and he died during the pendency of the action in the court below. His death was suggested, and Mary J. Cummins, administratrix of his estate, was substituted as plaintiff. It is an action for damages for the construction of an open ditch on the ways or streets on two sides of a residence property owned by the decedent within the city of Seymour. The complaint alleges the manner in which the ditch was constructed, by which the decedent's real estate was depreciated in value, rendered uninhabitable, and the means of ingress and egress to and from the said real estate were obstructed.

There was a demurrer to the complaint, by the appellant, which was overruled and exceptions reserved.

The first error assigned and discussed is the overruling of the demurrer to the complaint. One of the objections urged to the complaint is, that the heirs of the decedent are the proper parties plaintiff, instead of the administratrix. This objection is not well taken. The cause of action accrued during the lifetime of the decedent, and it survived, and his administratrix is the proper party to prosecute the action for damages. R. S. 1881, sections 281, 282 and 283.

There is a further objection urged to the complaint: That the complaint does not show any specific private interest the decedent had in the streets or ways, along which the ditch is constructed, differing from that of the general public. In this counsel for appellant are in error. The complaint clearly states and shows that the ditch was ten feet wide and three feet deep; that the decedent had sustained specific injuries by the obstruction of all means of ingress and egress to and from his said premises, on which he had erected a valuable dwelling-house; that the ditch was dug so near to the line of his lot that the soil of his lot from time to time falls into the ditch; that the corrupt, filthy and poisonous water from the swamp and other surface water and sewerage from the woollen mills are turned into the ditch; that the fall is insufficient to carry it off, and it remains in said ditch

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The City of Seymour v. Cummins, Administratrix.

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as stagnant water, and poisonous and unwholesome vapors and smells permeate and render impure the air over his lot and within his residence property, and malaria and disease are generated thereby, whereby said house and premises are rendered untenable; and that said ditch was constructed in 1877, and has ever since been maintained by said city in the same condition, and said ditch is a permanent one, and it was not the natural outlet for such drainage, and said drainage should have been by underground sewerage and not by an open drain.

The complaint was sufficient, and there was no error in overruling the demurrer.

The next error assigned is the overruling of appellant's motion to separate the causes of action stated in the complaint. This question is not presented by the record. It can only be presented by a bill of exceptions, or by proper record made at the time. No bill of exceptions was filed at the time of the ruling, and no time was given to file any, as appears of record. If, however, the question were properly presented by the record, there was no error in the ruling, as there was but one cause of action stated in the complaint.

Appellant filed a motion to make the complaint more specific, and to strike out parts of the complaint, which motions were overruled and exceptions reserved, and the rulings on the motions are assigned as error. There were no bills of exceptions presented at the time of the rulings, nor was time given to present and file the same, and there is no question presented as to such rulings by the record. *Rhine v. Morris*, 96 Ind. 81; *Manhattan L. Ins. Co. v. Doll*, 80 Ind. 113; *McIlvain v. Emery*, 88 Ind. 298.

Demurrers were filed by appellee, and sustained to the fourth and fifth paragraphs of appellant's answer, and the rulings are assigned as error.

The fourth paragraph alleges that the land of the decedent was wet and unfit for cultivation, and that it was improved and benefited by the drain, instead of being injured and

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damaged, as alleged in the complaint. There was no error in sustaining the demurrer to this paragraph. The general denial was pleaded, and the same evidence was admissible under the general denial as was admissible under this paragraph.

The fifth paragraph of answer alleged that all and every act and thing alleged to have been done by defendant in said complaint were done, if at all, by reliable contractors, and the defendant did not, nor did her officers, or agents and employees take, have or exercise any control in regard thereto, but all was done, controlled, managed and directed by Leonard W. Bartlett, who was the contractor for all work in and to the excavating, digging and constructing the said ditch mentioned and described in said complaint, and the defendant had no control over the same in any manner whatever.

The complaint charges the defendant with having caused the line of a ditch to be surveyed, marked and staked by her city engineer, and by her officers, servants and employees, in September and October, 1877, dug and caused to be dug on the line so surveyed an open ditch, ten feet wide and three feet deep, along the streets and ways on the north and west sides of said plaintiff's lot, and on one side of said plaintiff's lot it was constructed on the line of the lot, so that the soil of the lot from time to time caves and falls into said ditch; that the dirt excavated from said ditch was placed in piles and destroyed the grade of the street; that said ditch obstructed and deprived the plaintiff of all means of access to said lot, depriving plaintiff of all means of ingress and egress to and from said premises; that it was dug and constructed for the purpose of draining a pond and other surface waters from a portion of the city; that the defendant turned the sewerage from a woollen mill into the ditch, and other sewerage and corrupt waters into the ditch, and that it remained stagnant therein, and poisonous and offensive odors and vapors arose therefrom, and made the air over the real estate of the plaintiff, and passing in and through

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the house and residence of the plaintiff situate thereon, impure and unwholesome, rendering the premises and dwelling-house untenable ; and such corrupt, poisonous and filthy waters, so remaining stagnant in said ditch, generated malaria and disease ; and that said ditch was permanently constructed in such manner by said city, and so remained and was kept by said city as it was originally constructed ; and additional sewerage and corrupt and filthy waters were from time to time turned into the same by said city, up to the time of the commencement of this suit, in 1882 ; that one of the ways along which it was constructed, adjacent to the plaintiff's premises, was a private way of the plaintiff, and that it constituted a nuisance ; that the natural outlet for such drainage was in another direction, and it could not be obtained in the course in which the ditch in question was constructed.

The injury charged in the complaint was not the manner in which the work was performed and the ditch constructed ; the action is for damages sustained by reason of the ditch itself, located where it is for the drainage of the pond, surface waters and sewerage, and the injury resulting from the construction of a ditch where this is located, and by reason of it being maintained as an open ditch, and allowing stagnant, corrupt, filthy and poisonous waters to remain in the same, and obstructing the plaintiff's ingress and egress to and from his premises, and causing the soil of his lot to cave and fall into the ditch, and for which damages the city is liable. *City of Evansville v. Decker*, 84 Ind. 325 ; *Ross v. Thompson*, 78 Ind. 90 ; *City of Terre Haute v. Hudnut*, 112 Ind. 542 ; *Wabash, etc., R. W. Co. v. Farver*, 111 Ind. 195.

A city has general supervision of the drainage of the city, and is liable for defective plans for drainage. If a city adopt a proper plan of drainage, and let a contract for the doing of the work and the construction of the drain, the contractor to use his own method and means for the construction of the drain, and damages result by reason of the negligence of the

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contractor in doing the work, the city is not liable; but when the city adopts a plan of sewerage or drainage, and contracts for its construction, and it is constructed in accordance with the plan so adopted by the city, and injury is caused to a property-owner by reason of the negligence of the city in devising the plan and the construction of improper drainage, creating a nuisance, obstructing private ways or public ways in which the property owner has a special interest, the city is liable. And the answer in this case does not aver but that the contractor did the work and constructed the drain on the line and in the manner which the city directed and contracted it should be constructed. Nor does it controvert the fact that the city has maintained it in such manner, nor that all the injuries resulted to the plaintiff which are alleged in the complaint. Indeed, it controverts no averment of the complaint, but seeks to avoid liability on the ground that the ditch was constructed under a contract with one Bartlett. A city can not avoid liability in this way. The paragraph of answer is bad, and the demurrer was properly sustained. *Wood Master and Servant*, pp. 605, 606, section 313; *Wood Nuisances*, p. 81.

The court also sustained a demurrer to the sixth paragraph of answer, which ruling is assigned as error.

The sixth paragraph alleges that in 1872 one Charles Butler was the owner of said real estate described in the complaint, and for a valuable consideration mortgaged the same to the Northwestern Mutual Life Insurance Company, and that said mortgage had been foreclosed, and said land sold and a deed issued for the same long after the commencement of this suit. There was no error in sustaining the demurrer. It would not affect the right to recover if, after the commencement of this action, he had sold and conveyed the real estate. The action is for injury sustained to the real estate, rendering it less valuable, and it is not necessary that he should retain the title until after the rendition of the judgment. It may have been by reason of the real estate

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having been rendered untenable by the injury to the same that caused him to dispose of it, or suffer it to be taken on foreclosure of the mortgage. It is a cause of action accruing to the owner for consequential damages for injury to his real estate, and the damages accrue to the person owning the land at the time of the injury.

The next alleged error is the overruling of appellant's demurrer to the amended second paragraph of reply.

The second paragraph of reply is a reply to the third paragraph of answer, which is a paragraph of answer substantially the same as the fifth, and the reply alleges that the digging of the ditch and the construction of the same, including the depositing of the earth taken from the same, was done by the contractor in the exact manner contracted for by the city, specifically stating that it was constructed on the line and in the manner directed, and as contracted by the city that it should be done, and is the same work described in the complaint; and that it was accepted by the city, and has ever since been maintained by it in the same manner; and that the injuries complained of resulted therefrom. There was no error in overruling the demurrer to this paragraph of reply. The paragraph of answer to which it is addressed is bad, for the reasons we have given in passing upon the fifth paragraph of answer, and a bad reply is good to a bad answer; but the reply is good, even if the paragraph of answer had contained allegations which would have made it sufficient.

Appellant offered in evidence the transcript of the proceedings and judgment of the court in the foreclosure suit upon which said real estate was sold, which was objected to, the objection sustained, and the evidence excluded; and the ruling of the court is assigned as a cause for a new trial. This ruling of the court was correct. The judgment of foreclosure was rendered long after the commencement of this suit, and it was not competent as evidence on the trial of this cause. Some other errors are assigned on account of the rulings of

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the court in the exclusion of evidence, which are stated as causes for a new trial. While they are not properly referred to and stated in the appellant's brief, yet we have examined the questions presented by the rulings, and we think there was no error committed for which the judgment should be reversed, and do not deem it proper to extend this opinion by making a detailed statement of each. We find no error in the record.

Judgment affirmed, with costs.

BERKSHIRE, J., took no part in the decision of this case.

Filed May 27, 1889.

119	155
119	296
120	448
121	579
122	174
123	547
119	155
127	543
119	155
132	451
119	155
158	507

No. 13,561.

THE PHENIX INSURANCE COMPANY, OF BROOKLYN, v.  
PICKEL.

**INSURANCE.—Occupancy of Property.**—Where a complaint upon a policy of insurance, covering a barn, farming implements, hay, grain, stock, etc., alleges that on a certain day the barn, and the other property covered by the policy and in the barn at the time, were destroyed by fire, it sufficiently appears that the building was occupied at the time of its destruction.

**SAME.—Complaint upon Policy.**—A complaint averring that the property insured was the plaintiff's property at the time the policy was issued, that it was on his premises when it was destroyed by fire, that the plaintiff was damaged to the value thereof, and that he had performed all the terms of the contract on his part, states a cause of action.

**SAME.—Burden of Proof.**—In an action upon a policy of insurance, the plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts; but it is sufficient for him to show fulfilment of the conditions of recovery, and the burden is then upon the defendant to show a breach of warranties.

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**SAME.—***Divisibility of Policy.*—Where a policy of insurance covers several items of property, and the property is so situated that the risk on one item can not be affected without affecting the risk on the other items, such policy is entire and indivisible; but if the property is so situated that the risk on each item is separate and distinct, the policy is several and divisible.

**SAME.—***False Representations.—Divisible Risk.*—Where a policy covers a barn and its contents, and a dwelling and its contents, it is several and divisible as regards the barn and house, and false representations as to the condition of the house will not avoid the policy as to the barn and its contents.

**SAME.—***Condition Against Encumbrances.*—A provision in a policy, that “if the property shall hereafter become mortgaged or encumbered, this policy shall be null and void,” relates to liens voluntarily placed upon the property by the insured, and does not apply to judgments or other liens created by law.

**SAME.—***Overvaluation.*—A policy of insurance will not be avoided on account of a breach of warranty as to the value of the property involved, unless the breach is a substantial one.

**INSTRUCTIONS TO JURY.—***Burden of Proof.*—Where the defendant has withdrawn the answer of general denial, an instruction that the plaintiff is entitled to recover, unless the defendant has proved an affirmative defence by a preponderance of the evidence, is right.

From the Knox Circuit Court.

*J. McCabe and E. F. McCabe, for appellant.*

*W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellee.*

**COFFEY, J.**—This was an action by the appellant against the appellee, brought in the Knox Circuit Court, to review a judgment. The court sustained a demurrer to the complaint, and the appellant assigns for error this ruling of the circuit court. A complete transcript of the judgment sought to be reviewed is filed with the complaint, and it is alleged that said judgment is erroneous in the following particulars, viz. :

1st. That the court erred in sustaining the demurrer of the then plaintiff to the second paragraph of the answer of the defendant.

2d. That the court erred in sustaining the demurrer of



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the then plaintiff to the third paragraph of the answer of the then defendant.

3d. That the court erred in sustaining the demurrer of the then plaintiff to the seventh paragraph of the answer of the then defendant.

4th. That said court erred in awarding the open and close of the case to the then plaintiff.

5th. Error in overruling the motion for a new trial.

9th. Error of the court in overruling the motion in arrest of judgment.

12th. Error of the court in not sustaining the demurrer filed to the answers back to the complaint.

It is urged by the appellant, under the ninth and twelfth assignments of error, that the complaint in the original cause was bad.

The action was prosecuted on a policy of insurance issued by the appellant to the appellee, whereby the appellee was insured against loss or damage by fire on the property described in the policy. There was no demurrer to the complaint, and the question of its sufficiency is sought to be raised in this action for a review of the judgment based thereon.

It is contended by the appellant that to make the complaint good the appellee should have averred that the property, during the existence of the policy, never became vacant, and that it was occupied at the time it was destroyed by fire; that the appellee had an insurable interest; that the warranties contained in the application for the policy were true; and that the property had not been used for any purpose prohibited by the policy.

The policy of insurance in this suit covers several separate buildings, a barn, farming implements, hay, grain, stock, etc., and it is averred in the complaint that on the 29th day of December, 1885, said barn, and the farming implements, hay, grain, stock, etc., covered by said policy, and in said barn at the time, were destroyed by fire, without the fault of

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the assured. It thus sufficiently appears by the complaint that said building was occupied at the time of its destruction. It is also averred that the property insured was the appellee's property at the time said policy was issued; that it was on his premises, in said barn, at the time it was destroyed by fire, and that the appellee was damaged to the value thereof. It is also alleged in the complaint that the appellee performed all the terms of said contract of insurance on his part. We are, therefore, of the opinion that the complaint is sufficient to withstand the attack now made upon it, and that it states a cause of action against the appellant. *Home Ins. Co. v. Duke*, 75 Ind. 535; section 370, R. S. 1881; *Mason v. Seitz*, 36 Ind. 516; *Bertelson v. Bower*, 81 Ind. 512; *Aetna Ins. Co. v. Kittles*, 81 Ind. 96; *Board, etc., v. Hammond*, 83 Ind. 453; *Lowry v. Megee*, 52 Ind. 107.

Where a policy of insurance contains conditions and warranties like those contained in this policy, it is sufficient for the plaintiff to show fulfilment of the conditions of recovery which are made such by the contract itself. The burden is then upon the defendant to set forth and prove the untruthfulness of the representations, if there are any such, upon which he relies. The plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts. May Insurance, sections 183, 590; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212.

It is next urged that the court erred in sustaining a demurrer to the second, third and seventh paragraphs of the answer of the appellant to the original complaint.

The second paragraph of the answer avers that the policy of insurance in suit was issued upon a written application of the plaintiff to the defendant therefor, a copy of which application is filed with this answer; that in said application the plaintiff stated that dwelling-house No. 1, embraced in said application and policy, was only twelve years old, which statement he warranted to be true in said application, whereas,

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in truth and in fact, said dwelling No. 1 was then and there older than that, to wit, fifteen years old, whereby said plaintiff broke said warranty, and said policy became void.

The third paragraph alleges that the policy in suit was issued on the written application of the plaintiff; that in said application the plaintiff stated that dwelling No. 1 was in good condition, whereas, in truth and in fact, said house was in a very bad condition, there being openings in the walls so large that a cat could easily go in and out through such openings at pleasure; that the house was an old, dilapidated log hut, in bad fix generally, and thereby said warranty was and is broken, and said policy void.

The seventh paragraph of the answer averred that, after the execution of said policy, there was a judgment recovered against the plaintiff by Hebbard for \$266.87 by the consideration of the Knox Circuit Court, which was duly recorded in the office of the clerk of said Knox Circuit Court, and the same became a lien upon said land whereon the property insured was situate, which is a breach of the covenant against encumbrances, and which makes the policy void by its own provisions.

The provisions of the policy of insurance, material to the inquiry here, are as follows:

"By this policy of Insurance, the Phenix Insurance Company, of Brooklyn, New York, in consideration of —— dollars cash, and the payment at maturity of thirty-one dollars for which the insured hereinafter named has executed a certain promissory note or obligation of even date herewith, and payable on the 1st day of December, 1885, *does insure* Pleasant Pickel, Esq., against loss or damage by fire or lightning to the amount of nineteen hundred dollars, as follows:

"\$300 on one-story, board roof, log and frame building, occupied by assured as a dwelling.

"\$100 on household furniture, etc.

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“\$100 on one-story, board roof, log dwelling, occupied by tenant.

“\$300 on shingle roof, log and frame barn.

“\$50 on hay in barn.

“\$400 on reapers, mowers, etc.

“\$200 on grain in graneries or barn, etc.

“\$200 on horses, mules, etc.

“\$50 on hay in stack, etc.

“\$200 on board roof, frame smoke-house, etc.”

Now, if this is to be construed as a joint and entire insurance of the different articles above enumerated, then the court erred in sustaining the demurrer to the second and third paragraphs of the answer; but if it is to be regarded as several insurance of said items, then the court did not err, for it will be observed that there is no averment in these answers that there was any breach of warranty as to the barn or other property destroyed by fire. Upon this subject there is much confusion and conflict in the authorities, many of them, of great respectability, holding that such a policy is to be construed and applied as a joint insurance of the whole property named, while many more, of equal weight and respectability, hold that such a policy is to be construed as a several insurance of the different items named. Of the former class will be found: *Ætna Ins. Co. v. Resh*, 44 Mich. 55; *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211; *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472, and many others which might be cited; while of the latter class are: *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; *Trench v. Chenango Co. M. Ins. Co.*, 7 Hill, 122; *Koontz v. Hannibal, etc., Ins. Co.*, 42 Mo. 126; *Loehner v. Home M. Ins. Co.*, 17 Mo. 247; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164.

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In the case of *Havens v. Home Ins. Co.*, 111 Ind. 90, these conflicting authorities were carefully considered, and it was there held that where the contract of insurance is entire and indivisible, as it was in that case, a breach of one of the conditions in the policy affects the entire insurance. But the question of the effect of the breach of one of the conditions of the policy, where it was several and divisible, was left undecided. We think the true rule to be deduced from the authorities above cited is, that where the property is so situated that the risk on one item can not be affected without affecting the risk on the other items, the policy should be regarded as entire and indivisible ; but where the property is so situated that the risk on each item is separate and distinct from the others, so that what affects the risk on one item does not affect the risk on the others, the policy should be regarded as several and divisible.

In this case we are unable to see how the risk on the house named in the second and third paragraphs of the answer could affect the risk on the barn or the personal property for the destruction of which the suit was prosecuted. The risks on the different items of property named in this policy are, many of them, separate and distinct. It is true that the risk on the household goods, in the house, would be affected by whatever would affect the risk on the house ; so, the risk on the grain in the barn would be affected by whatever would affect the risk on the barn, but we think it impossible to conceive of how the risk on the barn could affect the risk on the house, or *vice versa*.

In our opinion the policy in suit, so far as it secured the appellee against loss in the destruction of the barn and the property contained therein, and the two houses and the household goods therein, is to be regarded as a several and divisible policy of insurance, and that the court did not err in sustaining the demurrer to the second and third paragraphs of the answer.

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It is settled in this State, that if a party, in order to procure insurance, warrants that his property is free from encumbrances, when in truth and in fact it is not in that condition, such false warranty will avoid the policy. *Leonard v. American Ins. Co.*, 97 Ind. 299. But in the seventh paragraph of the answer now under consideration, it is averred that a judgment was recovered after the policy was executed, which became an encumbrance on the property. The condition in the policy is, that, "If the property shall hereafter become mortgaged or encumbered, \* \* \* this policy shall be null and void."

It is evident that the parties did not, by the use of this language, intend to include every encumbrance that might attach to the property. This court judicially knows that a lien for taxes attaches to all property on the first day of April of each year, and that such lien constitutes an encumbrance on the property, and yet we apprehend it would not be seriously contended that such lien would avoid the policy in suit.

The answer is very indefinite and uncertain. It does not aver that the judgment therein named was in force at the time the loss occurred; whether it was voluntarily incurred, or whether it was set aside by the court, or instantly paid by the assured, or still remains unpaid. If rendered against the assured without his consent and paid at once, there would not be much justice in the contention that the policy in suit was thereby rendered void.

The defendant is claiming a forfeiture on account of a lien not voluntarily placed upon the property by the assured, but one created by law. When a clause in a contract is susceptible of two constructions, one of which will support and the other defeat the principal obligation, the former will be preferred. Forfeitures are not favored in law, and the party claiming a forfeiture will not be permitted, upon equivocal or doubtful clauses or words contained in his own contract, to deprive the other party of the benefit of the right or

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indemnity for which he contracted. In the case of *Baley v. Homestead F. Ins. Co.*, 80 N.Y. 21, it was held that language similar to that used in this policy had no reference to encumbrances created by judgment. In our opinion the word "encumbrance," used in this policy in connection with the word "mortgage," has no reference to such liens as may be created by law, but that it has reference to such liens only as the assured should voluntarily place upon it.

The answer, in our opinion, does not constitute a defence to the cause of action stated in the complaint.

It is also claimed that the court erred in instructing the jury that the plaintiff was entitled to recover unless the defendant had proven at least one of its defences by a preponderance of the evidence. This instruction was correct. The defendant had withdrawn the general denial, and, as the issues in the cause then stood, the plaintiff was entitled to a judgment for some amount, unless the defendant defeated his right by the establishment of at least one of its defences set up in the affirmative answers. We do not think the instruction is susceptible of the construction which appellant seeks to place upon it.

Other objections are urged to the instructions given by the court, but when construed as a whole we think they fairly stated the law, as applicable to the case made by the evidence. If there was any matter in which the appellant deemed them not sufficiently specific it should have asked to have the defect supplied.

It is also claimed that the evidence in the cause conclusively proved that the barn and other property covered by the policy of insurance were of less value than warranted. Questions of value must, from their nature, when not applied to articles having a fixed market value, be to a great extent matters of mere opinion. When the appellant executed the policy in suit it must have known this fact, and must be held to have contracted with reference to it. It is true that there might be such a disparity between the actual value of the

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property and that given by the party seeking insurance as to indicate an intention to mislead, but this is not such a case. The value of the barn in controversy is greatly in excess of the amount for which it was insured. It is settled, in this State, that to avoid a policy of insurance on account of the breach of a warranty, there must be a substantial breach. *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

This is an open policy, and the appellee could, in no event, recover more than the actual value of the property at the time of its destruction.

We find no error in the judgment sought to be reviewed for which it should be reversed. It follows that the Knox Circuit Court did not err in sustaining the demurrer to the complaint in this cause.

Judgment affirmed.

Filed May 27, 1889.

119	164
119	420
119	164
131	106
131	523
119	164
143	566
119	164
147	320
119	164
151	429
151	430
119	164
171	332

No. 13,008.

PURPLE ET AL. v. FARRINGTON ET AL.

**PARTNERSHIP.**—*Mortgage of Firm Property to Secure Individual Debt.—Validity of.*—A chattel mortgage executed by insolvent partners, upon all the firm property, to secure the individual debt of one partner, is valid, if made in good faith and with no intent to defraud partnership creditors.

**SAME.**—*Consideration.—Statute of Frauds.—Fraudulent Intent a Question of Fact.*—Under the statutes of this State, fraudulent intent is a question of fact, and no conveyance or charge will be adjudged fraudulent as against creditors solely on the ground that it was not founded on a valuable consideration.

**PLEADING.**—*Attachment.—Failure to Answer.—Waiver.*—Where an attachment plaintiff goes to trial without requiring an answer to be filed to the complaint in discharge of a rule, the complaint is not confessed by



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the defendant, but the filing of an answer will be considered as waived by the plaintiff and the case will be determined as though an answer had been filed.

From the DeKalb Circuit Court.

*W. L. Penfield*, for appellants.

*C. A. O. McClellan* and *D. A. Garwood*, for appellees.

BERKSHIRE, J.—The appellees, as partners, sued the appellants, Johnson and Cannan, as partners, to recover a sum of money claimed to be due them, and averred in their complaint that the said appellants had executed to their co-appellant, Purple, a chattel mortgage upon all the partnership goods owned by them to secure an alleged indebtedness due to the mortgagee from Cannan, one of the partners, contracted long before the existence of the partnership between Cannan and Johnson; that Johnson and Cannan were insolvent when the mortgage was executed, and that the said Purple accepted the mortgage with a full knowledge of all the facts; that the said mortgage was executed by Johnson and Cannan and accepted by said Purple for the purpose of defrauding creditors. With the complaint an affidavit in attachment was filed against Johnson and Cannan, charging them with having sold and conveyed their property, subject to execution, by way of chattel mortgage, for the purpose of defrauding creditors. A writ of attachment was issued to the sheriff of DeKalb county, which he executed upon the property described in the chattel mortgage and took possession thereof, the same at the time of the execution of the writ being in the possession of the appellant Purple as mortgagee. Johnson and Cannan moved to quash the writ of attachment, which motion the court overruled. Afterwards the appellees filed an amended complaint, to which the appellants filed demurrers, which were overruled by the court and exceptions saved. After the court had ruled on the demurrers, the appellant Purple answered the complaint by

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general denial, and at the same time filed a cross-complaint against the appellees and his co-appellants.

In his cross-complaint, the said Purple averred that, on the 14th day of September, 1885, the appellants Johnson and Cannan executed to him their promissory note for \$351.84, a copy of which was filed with the cross-complaint and as a part of it; that the said note was due and unpaid; that to secure the said note a chattel mortgage was executed by the appellants Johnson and Cannan, a copy of which is likewise filed with the complaint as a part of it; that the appellees afterwards sued out a writ of attachment in this action and caused the sheriff to forcibly dispossess the cross-complainant of said property by virtue of said writ, claiming that it constituted a superior lien on said goods, and they are made parties to answer and show why the said mortgage should not be foreclosed and said property sold to satisfy the said indebtedness due to the cross-complainant. It is also alleged that the said chattel mortgage was duly recorded within ten days after its execution.

The appellees demurred to the cross-complaint and the cross-complainant confessed the demurrer and obtained leave to file an amended cross-complaint, which he did, and which is designated by the clerk as being found beginning with page 10 of the record.

There is some contention by the appellees' counsel as to whether the pleading found at the place referred to in the record is the original or amended cross-complaint. As we have said, the clerk designates it as the amended cross-complaint, but whether it is the one or the other is wholly immaterial; it is evident from all that appears in the record that it is the cross-complaint upon which issue was joined and the case tried.

The appellees answered the cross-complaint in one paragraph, in substance as follows: Johnson and Cannan became indebted to the appellees during the months of May, June, July, August and September, 1885, on account of mer-

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chandise sold and delivered, in the sum of \$554, and that the said indebtedness is still due and owing from said firm; that at the time the said indebtedness was contracted, Cannan, one of the members of said firm, was indebted in his individual capacity to his co-appellant, Purple, in the sum mentioned in said mortgage, the said indebtedness having been contracted long before the formation of said partnership, and that the appellant Johnson was in no way liable for the payment of said debt; and that on the 9th day of September, 1885, the appellants Johnson and Cannan, without any other consideration except said debt of Cannan, executed and delivered the said note and chattel mortgage to their co-appellant, the said mortgage being given to secure the payment of said note, the goods mortgaged being the firm property of Johnson and Cannan, and the said firm at the time being insolvent; all of which was known to the said appellant Purple.

It is alleged that the mortgaged property was all of the property owned by the said firm, and that it was not of a value greater than the indebtedness it was given to secure; that the said members of said firm had no individual property subject to execution; all of which it is alleged was known to the said Purple.

The answer then recites the proceedings in attachment, and asserts that the execution of the writ of attachment gave to the appellees a superior lien on said property to the said mortgage lien.

The appellant Purple filed a demurrer to the said answer, which was overruled by the court and he reserved an exception; he then filed a reply, which is of some length, but in legal effect is but a mere denial.

The cause was afterwards submitted to a jury, and a special verdict returned at the request of the parties. The jury found that the appellants Johnson and Cannan were partners, and had been for some time past, and, as such firm, were largely indebted to the appellees and others; and, being so

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indebted, they, on the 14th day of September, 1885, executed the note and mortgage sued on by the cross-complainant, and that the sole consideration for the note was the private indebtedness of the appellant Cannan; that the mortgage was duly recorded within ten days after its execution, and that there is now due on the note and mortgage \$384.12; that the mortgaged property was the property of the said firm of Johnson and Cannan, except some book accounts, amounting to about \$100, all of which was known to the appellant Purple when he took the said mortgage; that the said firm was insolvent at the time; that the mortgaged property was all of the property belonging to said firm, and that these facts were all well known to the said Purple when the mortgage was executed. It is found that the individual partners were, at the time of the transaction, insolvent; that on the 14th day of October, 1885, the appellees filed their complaint in this cause, and at the same time filed their affidavit in attachment, obtained a writ of attachment and caused it to be executed upon the mortgaged property, and that the sheriff of DeKalb county now holds said property by virtue of said writ.

It is further found that in the execution of said mortgage and note by his co-appellants to the appellant Purple, there was no fraudulent intent to hinder or delay the partnership creditors of the said firm in the collection of their debts; that Johnson and Cannan were equal partners, but Cannan had put into the firm \$1,372 and Johnson only \$861, and because of the difference Cannan insisted that his debt to Purple should be secured, and in consideration of said facts and of an extension of time of payment to Cannan of thirty days, said note and mortgage were given; that afterwards the mortgagors delivered possession of said mortgaged property to the mortgagee, and thereafter the appellees commenced this proceeding in attachment, and the said sheriff thereby obtained possession of the property and still holds possession of the same.

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It is contended in argument by counsel for the appellees that, as the appellants Johnson and Cannan filed no answer to the complaint or affidavit in attachment, as against them both must be taken as confessed. We are not of this opinion. The said appellants appeared to the action and were ruled to answer, and until this rule was withdrawn they were not subject to a default. The most that could have been done would have been to close the rule for want of an answer. This was not done, but the parties went to trial without answers being filed and thereby the appellees waived the filing of an answer by the appellants, and the case must be considered and the questions involved determined as though an answer had been filed. So far as the action was concerned, including the ancillary proceeding, the appellant Purple was in no way affected or harmed, the suit having been dismissed as to him.

The cross-complaint undoubtedly stated a good cause of action. Under our statute of frauds and perjuries the question of fraudulent intent is always a question of fact, and no conveyance or charge will be adjudged fraudulent as against creditors solely on the ground that it was not founded on a valuable consideration. R. S. 1881, section 4924.

The averments in the answers of the appellees to the cross-complaint of the appellant Purple disclose a valuable consideration for the note and mortgage executed to him by his co-appellants, if not a consideration moving to the firm. We are not prepared to say that the facts as found by the jury do not develop a consideration moving to the firm, but upon that question it is not necessary that we express an opinion. The central question presented by the record is, whether or not the members of a partnership, largely indebted and insolvent, may mortgage the firm property to secure an individual indebtedness, if in so doing they act in good faith. The answer to the cross-complaint does not charge a fraudulent intent, and in the verdict of the jury it is expressly found that, in the execution of the mortgage in

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question, there was no fraudulent intent to hinder or delay firm creditors in the collection of their debts. The statutory provision to which we have called attention is of itself sufficient to control the decision of the question involved.

The question of fraudulent intent being a question of fact and not of law, its determination will depend upon what shall be decided by the tribunal to which it is submitted, after the evidence is introduced and considered ; and if, after due consideration, the decision is in favor of the *bona fides* of the transaction, then it must be upheld. But the question is not barren of authority. We quote from the opinion of the court, delivered by MITCHELL, J., in the case of *Winslow v. Wallace*, 116 Ind. 317 : “It is settled everywhere, that where the assets of a partnership, or the individual property of the members of the firm, are brought under the jurisdiction of a court for judicial administration, the equitable rule of distribution will be applied, and the partnership assets will be devoted first to the payment of the firm debts, and the individual property of the several partners to their individual debts respectively. But where the partnership assets remain under the control of the partners, they have the power to appropriate any portion of it to pay or secure the individual debts of the members of the firm. Thus, in *Fisher v. Syfers*, 109 Ind. 514, this court said : ‘Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors by the execution of a chattel mortgage, in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of the creditor. *Nat’l Bank, etc., v. Sprague*, 20 N. J. Eq. 13 ; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46 ; *Kennedy v. Nat’l Union Bank*, 23 Hun, 494 ; *Jones Chat. Mort.*, section 44 ; *In re Kahley*, 2 Biss., 383.’ So in the same decision it is said : ‘The rule that obtains in the distribution of the estates of partners, and under which partner-

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ship creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners respectively. "Partnership creditors have no lien upon partnership property ; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners." *Warren v. Farmer*, 100 Ind. 593 ; *Trentman v. Swartzell*, 85 Ind. 443. Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit ; each has the right to waive his equitable lien, and together they may sell, assign or mortgage the property of the firm, to pay or secure either an individual debt of one of the partners, or the debts of the firm.' The equity of the creditors is a derivative one, and arises out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners, so long as the right of any of the partners has not been waived. But the partners may waive their rights either in the partnership property or in that owned by them individually. *Dunham v. Hanna*, 18 Ind. 270 ; *Case v. Beauregard*, 99 U. S. 119, and cases cited."

We take the following from the opinion of this court, delivered by OLDS, J., in the case of *Goudy v. Werbe*, 117 Ind. 154 : "The true doctrine is, that the property of the partners is their joint property, and they may sell and dispose of the same in good faith as they deem proper ; and as held in the case of *Fisher v. Syfers*, 109 Ind. 514, they have the right to prefer creditors, and even may, if all the partners consent to do so, dispose of the property to satisfy the individual debt of one of the partners, which would operate to decrease the assets of the firm and to the detriment of the firm creditors, yet, nevertheless, they have such right to secure or pay the *bona fide* debt of one of the partners."

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These cases are decisive of the question under consideration, but we cite the following authorities as bearing upon the question: *Louden v. Ball*, 93 Ind. 232; *McFadden v. Fritz*, 90 Ind. 590; *McFadden v. Hopkins*, 81 Ind. 459; *Morris v. Stern*, 80 Ind. 227; *Schaeffer v. Fithian*, 17 Ind. 463; *Kistner v. Sindlinger*, 33 Ind. 114.

Upon the facts as found by the jury the court should have rendered judgment for the appellant Purple, upon his cross-complaint, for the amount due on the note therein sued upon, and a decree foreclosing the mortgage.

In the main action the appellees should have had judgment against the appellants Johnson and Cannan for the amount found due them on the account sued on; and in the ancillary or attachment proceeding judgment should have been rendered against the appellees and for the said appellants Johnson and Cannan.

Judgment reversed, with costs, and with instructions to the court below to render judgment as above indicated.

Filed May 27, 1889.

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No. 13,635.

SHOCKLEY v. STARR ET AL.

REAL ESTATE.—*Action to Recover.*—*Sheriff's Sale.*—*Widow's Inchoate Interest.*—*Estoppel.*—*Title.*—In an action by a surviving wife to recover possession of an undivided one-third of land sold on execution against her husband, the sheriff's sale is not conclusive upon the defendant as to the execution debtor's title, in the absence of a showing that possession was taken and title asserted thereunder, and he may show an inde-



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pendent chain of title back to an admitted former owner. *Wright v. Tichenor*, 104 Ind. 185, distinguished.

From the Howard Circuit Court.

*J. C. Blacklidge, W. E. Blacklidge and B. C. Moon*, for appellant.

*M. Bell and W. C. Purdum*, for appellees.

OLDS, J.—This is an action brought by the appellant to recover possession and quiet her title to the undivided one-third ( $\frac{1}{3}$ ) of lots 97 and 98, in the original plat of the town of Kokomo, Howard county, Indiana.

Trial; finding and judgment for the appellees; motion for a new trial by appellant, which was overruled and exceptions reserved. The only error assigned is the overruling of the motion for a new trial.

The appellant claims title to the undivided one-third of the real estate in question as the widow of Eli C. Shockley. It is contended by counsel for appellant, that the evidence shows that Howard county recovered judgment against Eli C. Shockley for \$89.61 and costs, in the Howard Court of Common Pleas, on January 7th, 1857; that afterwards execution was issued on said judgment, and the real estate in question levied upon and sold by the sheriff of said county by virtue of said execution, and the county of Howard became the purchaser, and a deed was made to the county in pursuance of said sale; that, subsequent to such purchase, the county sold and deeded said lots to Nancy Starr; that Nancy Starr died, and appellee Reuben E. Starr inherited her title to the lots, and afterwards Reuben E. Starr conveyed one of the lots to appellee Lack Guinan. Upon this state of facts counsel contend that both appellant and appellees derive their titles from Eli C. Shockley, and that neither party is at liberty to deny that Eli C. Shockley had title.

The record shows that it was admitted by the parties upon the trial, "that, on and previous to the 3d day of December, 1844, David Foster was the owner and in possession of the

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real estate in controversy in this suit, and which is included in the description in the following deed." Then follows a deed introduced in evidence, being a deed from David Foster to Richardville county. The commissioners' record and plat of the real estate described in the deed from Foster aforesaid, constituting and being the original plat of the town of Kokomo, which includes lots 97 and 98 in controversy in this suit, were also introduced in evidence. The deed, record and plat were introduced in evidence by the appellees, over the objection of the appellant. The objection made and stated to the introduction of the deed, record and plat, is as follows: "The plaintiff objects to the deed, the commissioners' record and plat offered in evidence, for the reason that, when both parties to an action claim title from the same person, neither is at liberty to deny that such person had title to the real estate. The assertion of title through a sheriff's deed involves the assumption that the land was the judgment debtor's, and as such was subject to seizure and sale. The purchaser at a sheriff's sale necessarily asserts that the judgment debtor owned the property sold upon the judgment, and that one claiming a title through a sheriff's sale of a married man's real estate upon an execution against him gets only the title of the husband, and he can not dispute the right of the wife given by statute; that the act of Howard county, in causing said lots 97 and 98 to be sold upon execution as the property of Eli C. Shockley, estops Howard county and all persons claiming title through Howard county from disputing in any way that Eli C. Shockley, at the time of the levy of that execution, had title to the lots which were levied upon by the sheriff and purchased by the county."

It was further admitted on the trial, "that the name of Howard county was formerly Richardville county, and afterwards changed to Howard."

There is no evidence in the record to show that Eli C. Shockley ever received any conveyance for the lots, or that

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any title to the lots was ever in him, or that he was ever in the possession of the same. The sole question sought to be presented by the appellant is, that, Howard county having had a judgment against Eli C. Shockley, and having caused an execution to be issued on such judgment and the lots in question to be levied upon as the property of Shockley and sold to satisfy the judgment, and becoming the purchaser of the lots, the county, and all persons claiming title to the lots through the county, are estopped from denying that Eli C. Shockley had title to the lots at the time of the levy and sale, and as against them it is conclusively presumed that Shockley was the owner at that time. Numerous authorities are cited which counsel contend support this position, the principal case relied upon being *Wright v. Tichenor*, 104 Ind. 185, but that case holds no such doctrine. In that case the deed to the husband of the appellant was unrecorded. Appellant's husband received a deed for the real estate in question from one Davidson, and executions were issued on judgments rendered against the husband, and the real estate sold; the purchaser at sheriff's sale took possession, and afterwards received a quitclaim deed from said Davidson and wife for the real estate. The decision is expressly limited to the point in that case, and it holds that the purchaser at sheriff's sale stood in the same position as if he had purchased of appellant's husband, and that he stood in the light of a purchaser with notice of the facts when he received the quitclaim deed from Davidson; and, as Davidson had no title at the time he executed the quitclaim deed, it did not even convey color of title to the grantee with notice. It is further said by the court, in that case: "The title under which the appellee's grantor entered into possession, therefore, comes from the same source as that asserted by the appellant, and the relation occupied by the parties is substantially that of tenants in common; hence the appellee cannot assail the common source of title, nor by a release and quitclaim from the grantor of that title destroy his co-tenant's title." But

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the facts in that case differ very materially from this case. In that case the facts show that the purchaser at sheriff's sale took possession of the real estate under the purchase at sheriff's sale, and the court says that "the wife of the judgment debtor has a right to presume that possession once taken under the sheriff's deed continues to be held under that deed, and to permit the purchaser to secure a quitclaim from her husband's grantor and assert that against her would put her at a great disadvantage, since she has no opportunities of knowing that there is any change in the character of the possession in the title under which it is held. She is not bound to watch, day by day, to see whether some change is made in the character of the possession, or some new claim of title asserted." In that case the purchaser recognized the judgment debtor's title to the real estate, and took possession under the purchase, and the judgment debtor was, in fact, the owner; and, after having purchased and taken possession, the deed from Davidson to the judgment debtor not being of record, the purchaser sought to avoid the interest of the debtor's wife in the real estate by obtaining a quitclaim deed from Davidson. The court held that the purchaser at sheriff's sale took the quitclaim deed with notice of the fact of the judgment debtor's title, and consequently with notice of the fact that his grantor had no title to convey when he executed the quitclaim deed.

It is a rule of law, too well settled to require the citation of authorities, that the plaintiff, in an action to recover possession of real estate, must recover on the strength of his own title, and that he must either trace his title back to the United States or to a grantor in possession under claim of title at the date of his conveyance. *Castor v. Jones*, 107 Ind. 283; *Peck v. Louisville, etc., R. W. Co.*, 101 Ind. 366; *Brandenburg v. Seigfried*, 75 Ind. 568. And if the plaintiff fail to show title he can not recover, though the defendant have no title. *Deputy v. Mooney*, 97 Ind. 463. In this case it is admitted that Foster owned the real estate in 1844; the

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defendants show a complete chain of title from Foster. Certainly the proposition can not be supported by authority, that a defendant in an action to recover real estate may not show a complete and perfect chain of title back to an admitted owner, or to the United States, or to a grantor in possession under claim of title, by virtue of which he claims title, independently of the fact that he may have a defective title by quitclaim, or sheriff's sale and deed on execution against a grantor through whom the plaintiff claims title.

The admitted owner, in this case, from whom a valid title must come, and to whom title must be traced, was Foster. The plaintiff makes no effort to introduce a chain of title reaching back to Foster, but contents herself with showing that the county of Howard held a judgment against her husband, upon which execution was issued and the land sold to satisfy the same, and does not attempt to even show that possession was taken under and by virtue of such sale.

The defendant shows a complete chain of title back to the admitted owner, independent of the sheriff's sale. This the defendant clearly had a right to do ; and the deed from Foster, and the commissioner's record and plat were properly admitted in evidence. If there was no admission as to Foster having been the owner of the land, and no evidence of title in the county except such as was derived by the sheriff's sale, and proof of taking possession by the county under the sheriff's deed, there would be an entirely different question presented ; but, under the evidence in this case, the finding of the court was correct.

Where title is admitted in a grantor, or both parties to an action claim title to the land from the same person, it is only necessary for the plaintiff to show the better title from the person through whom both parties claim. But that principle does not apply in this case, as regards tracing title to the appellant's deceased husband ; but it does apply in tracing title to Foster, who it was admitted owned the lots at a certain

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date ; and, as we have said, the plaintiff did not attempt to trace title back to Foster, and the defendants proved a complete chain of title from Foster to them.

There are some other rulings in the admission of evidence assigned as error. If all the evidence which appellant complains of, in the remaining assignments of error, had been excluded, still there was no evidence upon which she was entitled to recover, and no harm resulted to her by the admission of the evidence objected to.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed May 28, 1889.

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No. 13,733.

MORGAN v. WEIR.

**EVIDENCE.—*Relevancy.—Payment.***—The question in controversy between A. and B. was whether the latter had paid the former one hundred and forty dollars in May, 1883, on a debt. V., a witness called by B., testified that he bought a horse from B. in that month, and paid him one hundred and fifty dollars for it, not far from a bank. B. testified that he sold the horse to V., received the money and took it to the bank, intending to deposit it, but meeting A. there paid him one hundred and forty dollars of it.

*Held*, that the testimony of V. was competent.

From the Hendricks Circuit Court.

*E. G. Hogate, R. B. Blake and H. J. Milligan*, for appellant.

*J. V. Hadley*, for appellee.

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ELLIOTT, C. J.—This record presents a single question. The sole dispute between the parties was whether the appellee paid the appellant one hundred and forty dollars in May, 1883, on an interest bearing note held by the latter against the former. Benjamin Vestal, a witness called by the appellee, testified that he bought a horse from the appellee in May, 1883, and paid him for it one hundred and fifty dollars; that the money was paid not far from Tomlinson's bank, in the town of Plainfield. The appellee testified that he sold the horse to Vestal and received the money for it; that he took the money received from Vestal to Tomlinson's bank with the intention of depositing it, but that he met the appellant there and paid him one hundred and forty dollars of the money he had received from Vestal. The appellant's contention is that Vestal's testimony was incompetent, because irrelevant, and thus is presented the only question in the record.

It is important to note that the evidence given is not remote, either as to the time or the place at which the principal event occurred, and that it bears upon two material questions in the case, the payment and the time of payment. It is also of importance that there is a connection between the subsidiary occurrence and the principal event. In view of the connection between the subsidiary fact and the principal event, and the nearness of time and place of the one to the other, we adjudge that the testimony was competent. If the appellee had testified that he obtained the money from Vestal, it is quite clear that it would have been competent for the appellant to have placed Vestal on the witness-stand and to have asked him if the appellee did, in fact, get the money from him; and if this be so, it is difficult to conceive why the appellee is not entitled to prove the fact that he did get the money from the person he named in his testimony. Certainly, the appellee had a right to testify that he got the money from Vestal, and if he might himself state that fact,

what conceivable reason can there be for holding that he might not prove it by Vestal?

Wharton says: "Hence it is relevant to put in evidence any circumstance which tends to make the proposition at issue either more or less improbable." 1 Wharton Ev. (3d ed.), section 21. In *Brooke v. Winters*, 39 Md. 505, the court quoted, with approval, this statement from Phillipps on Evidence: "Any circumstances that may afford a fair and reasonable presumption of the fact to be tried, are to be received and left to the consideration of the jury, who are to determine upon their precise force and effect." In *Beckley v. Jarvis*, 55 Vt. 348, evidence of the financial condition of a party was held competent upon the issue whether goods were or were not sold to him on credit. Many cases were reviewed in *Dowling v. Dowling*, 10 Irish C. L. R. 236, and it was held that evidence of the financial condition of a party was often competent and material. The case before us falls within the general doctrine there declared, and the doctrine we regard as a just one. There must, of course, always be care and discrimination in the application of general rules to particular instances, for it is by no means every instance to which a general rule can be applied, but we are satisfied that, considering the connection between the subsidiary fact and the principal one, and considering also the closeness as to time and place between the two facts, no error was committed in ruling that the testimony was not irrelevant.

Judgment affirmed.

Filed May 28, 1889.



Calton et al. v. Lewis et al.

No. 13,637.

CALTON ET AL. v. LEWIS ET AL.

**DEED.—Description.—Mistake.—When Deed not Void.**—The omission from the description contained in a deed of the name of the State in which the land is situate does not render the deed void, if, taking all the facts appearing upon its face, with the legal presumptions which flow from them, a true description may be supplied by the aid of averments and proof.

**SAME.—Reformation.—Breach of Covenant of Seizin.—Damages.**—In such a case, it is not essential to the grantee's right to recover damages for a breach of the covenant of seizin that the deed should first be reformed; the deed not being void, it is only necessary that the identity of the land described be proved, under proper averments, and that a breach of the covenant, with resulting damages, be shown.

**SAME.—Mistake of Fact.—What is.**—It is a mistake of fact when, through ignorance, inadvertence, negligence or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did.

**SAME.—Executed in Another State.—Proof of Statutory Sufficiency.**—Whether a deed was executed in conformity with the statute of the State in which it purports to have been executed, so as to constitute a valid conveyance, is susceptible of proof under an averment that the deed was executed and the land conveyed by the grantor.

From the Warren Circuit Court.

*J. W. Sutton* and *W. L. Rabourn*, for appellants.

*J. McCabe* and *E. F. McCabe*, for appellees.

**MITCHELL, J.**—On the 13th day of March, 1884, Lewis and wife conveyed, by a deed containing covenants of general warranty, seven hundred and fifty-four acres of land to Henry T. and Henry N. Calton. That part of the deed material to be considered reads as follows :

“ STATE OF TENNESSEE, LAWRENCE COUNTY.

“ For and in consideration of, etc., \* \* \* we, Samuel R. Lewis and Sally J. Lewis, his wife, have this day bargained and sold \* \* \* unto H. T. and Henry N. Calton the follow-

119	181
194	358
195	357
119	181
131	23
119	181
138	106
139	12
119	181
146	347

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ing described tract or tracts of land, lying and being on the waters of Crowder creek, in the 10th civil district of Lawrence county, in range five, section one, bounded as follows," etc.

This deed was duly acknowledged by the grantors before the clerk of the county court of Lawrence county, in the State of Tennessee.

This suit was brought by the grantees, who alleged in their complaint that, at the time the deed was executed, one Voss was in the adverse possession of a part of the land so conveyed and warranted, holding the same by title paramount to that of the grantors; that the plaintiffs had never obtained possession of the tract so adversely held, and that they had thereby sustained damages, for which they prayed judgment.

The plaintiffs were denied a recovery in the court below, on the ground that the deed was void for want of a sufficient description of the land conveyed, the invalidity alleged being that the State in which the land is situate can not be ascertained from the deed. This objection is not well taken.

"A deed will not be declared void for uncertainty as long as it is possible by any reasonable rules of construction to ascertain from the description found therein what property it was intended to convey." *McDonald v. Payne*, 114 Ind. 359; *Wendell v. Jackson*, 8 Wend. 183; *Stone v. Stone*, 116 Mass. 279.

The inquiry in such a case is, could a surveyor take the deed and ascertain from an inspection of it where the land was located, so that he could mark out the tract, by going upon the land, from the description and references contained in the deed? The only infirmity alleged in respect to the deed in the present case is, that it omits to name the State in which the land conveyed is situate. Upon looking at the deed, it will be seen that it begins thus: "State of Tennessee, Lawrence county." It is recited in the body of the deed that the land bargained and sold lies in Lawrence county, and the grantors appeared before the clerk of the

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county court of Lawrence county, in the State of Tennessee, and acknowledged the deed. Coupled with an averment in the complaint that the land bargained and sold, and intended to be conveyed, was situate in Lawrence county, in the State of Tennessee, the plaintiffs were entitled to show the facts, and in case a breach of the covenants of warranty existed, as alleged, to recover damages accordingly.

The true rule upon the subject is, that where the description in a deed or mortgage is so uncertain as to afford no reliable clue to a more correct and definite description, as in case there is nothing in the instrument to indicate the State, county or locality in which the land is situate, it will be held void; but if, taking all the facts which appear upon the face of the instrument, and the legal presumptions which naturally flow from those facts, a true description may be supplied by aid of proper averments and proof, the instrument will be held sufficient. *Dutch v. Boyd*, 81 Ind. 146; *Noland v. State, ex rel.*, 115 Ind. 529.

That part of a deed or contract which relates to the description of the premises should be liberally construed, so as to make the instrument available (*Hannon v. Hilliard*, 101 Ind. 310), and a court will only declare a deed void for uncertainty when, after resorting to oral proof, it still remains mere matter of conjecture what was intended by the instrument. *Roehl v. Haumesser*, 114 Ind. 311, and cases cited. The omission to repeat the name of the State, after the recital that the land was situate in the county of Lawrence, was not, as is contended, a mistake of law. It is an error to suppose that a written instrument can only be corrected where the mistake results from the omission or insertion of words different from those agreed upon, or contrary to the expressed intention of the parties. It is a mistake of fact when, through ignorance, inadvertence, negligence or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did. The inquiry in such a case

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must be, what was the subject of the contract, not what words were agreed upon as descriptive of the land. *Baker v. Pyatt*, 108 Ind. 61; *Keister v. Myers*, 115 Ind. 312. If, therefore, the name of the State was omitted through the negligence or inadvertence of the parties, or of the scrivener who prepared the deed, or if it was supposed that the State in which the land was situate was sufficiently identified by the caption to the deed, it does not constitute a mistake of law of which the grantor can avail himself when asked to respond for a breach of the covenants contained in the deed. In a case like the present, it is not essential to the grantees' right to recover damages for a breach of the covenant of seizin that there should first be a reformation of the deed.

The deed not being void, it is only necessary that, under proper averments, the identity of the land described in the deed be proved, and that it be shown that there was a breach of the covenant of seizin, and that the plaintiffs have sustained damages in consequence. *Roehl v. Haumesser, supra*. If the facts make a case entitling them to the reformation of their deed, they may recover without first having it reformed. *Gordon v. Goodman*, 98 Ind. 269.

The deed contains a valid covenant of seizin, and whether or not it was executed in conformity with the statute of the State of Tennessee, so as to constitute a valid deed of conveyance, was susceptible of proof under the averments in the complaint that the defendants had executed a deed and conveyed the land therein described. *Bethell v. Bethell*, 92 Ind. 318. The rulings of the court seem to have been based upon the assumption that the deed was void for want of a sufficient description of the land. This was error, for which the judgment should be reversed.

The judgment is reversed, with costs, with directions to the court to sustain the appellants' motion for a new trial.

Filed May 28, 1889.

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Keesling v. Frazier.

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No. 13,132.

## KEESLING v. FRAZIER.

**CONTRACT.—Recognizance.—Agreement of Third Person to Indemnify Surety.—**

**Statute of Frauds.**—A contract whereby A. agrees with B. that in consideration that the latter will enter into a recognizance, as surety, for the appearance of C. to answer a criminal charge, A. will indemnify B. for any loss he may sustain, is not within the statute of frauds, as an agreement to answer for the default of another, but is valid as an original agreement.

**SAME.—Measure of Recovery.**—Under such contract B. is entitled to full indemnity, and a judgment against A. for the amount of the recognizance and the costs made in taking judgment thereon, with six per cent. interest from the date of the payment of the same by B., is proper.

From the Delaware Circuit Court.

*R. S. Gregory* and *A. C. Silverburg*, for appellant.

*W. W. Orr* and *J. E. Mellette*, for appellee.

**COFFEY, J.**—It is averred in the complaint in this cause, that in the year 1884 Felix Leffingwell was under indictment, in the Randolph Circuit Court, for selling intoxicating liquor without a license so to do; that he was arrested on a warrant issued on said indictment, and that the appellant herein, being interested in his release from custody, and desirous of obtaining bail for him, contracted and agreed with the appellee that in consideration that he would enter into a recognizance with the said Leffingwell for his appearance in said court to answer said charge, he, appellant, would indemnify appellee for any loss he might sustain by reason thereof; that, pursuant to said contract and agreement, he did enter into a recognizance with said Leffingwell for his appearance in said court to answer said charge on a day named in said recognizance; that the said Leffingwell failed to appear at said time, pursuant to said recognizance, and answer said charge, by reason of which the said recogni-

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zance was forfeited and the appellee was compelled to and did pay in discharge thereof, and in discharge of the costs thereon, the sum of \$231.83; that the appellant, although often requested so to do, has failed and refused to indemnify the appellee.

The defendant answered: 1st. By general denial. 2d. Want of consideration.

A trial by jury resulted in a verdict against the appellant for the sum of \$239.43. The appellee remitted \$14.73, and the court, over a motion for a new trial, rendered a judgment against the appellant on said verdict. The appellant assigns as error:

1. That the circuit court erred in overruling the appellant's demurrer to the appellee's complaint.

2. That the said court erred in overruling the appellant's motion for a new trial.

3. That the said court erred in overruling the appellant's motion in arrest of judgment.

It was formerly held that an agreement like the one set up in the complaint in this cause was void, as being an agreement to answer for the default of another; but it is now held, in this State, that such an agreement is valid, as an original agreement, and is not within the statute of frauds. *Anderson v. Spence*, 72 Ind. 315.

The complaint states a cause of action in favor of appellee against the appellant. The court below, therefore, did not err either in overruling the demurrer to the complaint or in overruling the motion in arrest of judgment.

It is earnestly insisted that the evidence in the cause does not support the verdict. The record shows that the appellant admitted all the material allegations in the complaint, except the allegations in relation to the contract therein set out. The evidence in the cause introduced by the appellee tended strongly to support the allegations in the complaint as to the contract. It is true that the evidence on the part of the appellant tended strongly to disprove these allega-

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tions, but the weight of the testimony was for the jury. We do not feel authorized to reverse this case on the evidence.

It is also contended that the court erred in its instructions to the jury. We have carefully examined the instructions, and they fairly stated the law of the case to the jury. They are quite lengthy, and no good purpose would be subserved by setting them out in this opinion.

It is claimed that the jury erred in assessing the damages, the amount assessed being too large. The judgment is for the amount of the recognizance and the costs made in taking judgment thereon against the appellee, together with six per cent. interest thereon from the date of the payment of the same by the appellee to the date of the rendition of the judgment in this cause. If the contract between appellant and appellee was such as is averred in the complaint, the judgment is for the correct sum. The appellee was entitled to be fully indemnified for all sums he was compelled to pay by reason of having signed the recognizance.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed May 28, 1889.

119	187
123	245
119	187
142	534

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No. 13,445.

BUCHANAN v. HUBBARD.

**LAW OF OTHER STATE.—Rule in Absence of Proof of.**—The laws of a State, to whose courts a party appeals for redress, furnish in all cases *prima facie* the rule of decision, and if either party claims the benefit of a different rule he must aver and prove it, like other facts of which the courts do not take judicial notice.

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**SAME.**—*Common Law.—Presumption as to.*—In respect to general principles, the common law is presumed to be in force in most of the States, subject to such modifications as may have resulted from legislative or judicial construction, and if no such modifications are shown, the courts of this State will apply such principles as they are interpreted in this State.

**SAME.**—There is no presumption that the common law prevails in the States in which civil governments were established prior to their becoming territories or States of the Union, but, in the absence of a showing to the contrary, it will be presumed that the law of such States is the same as that which prevails here.

**SAME.**—*Civil Law.—Louisiana Purchase.—State of Kansas.*—The State of Kansas, although territorially a part of the Louisiana purchase, is not one of the States in which the principles of the civil law ever prevailed.

**CONVEYANCE.**—*Husband and Wife.—Land in Other State.—Trust.—Common Law.*—Where the consideration for land situate in a State in which the common law is presumed to prevail is paid by a wife, and the conveyance taken in the name of the husband, without her consent, a trust will be held to result in favor of the wife, in the absence of a showing that the rule of the common law has been changed.

**SAME.**—*Conveyance by Infant.—Disaffirmance.*—Where the specific property received by an infant as a consideration for the conveyance of land remains in his hands at the time of disaffirming the conveyance, and is capable of return, he is bound to give it up; and if, after arriving at age, he disposes of the property received, or asserts title to it as his own, he thereby affirms the contract and can not recover the land conveyed by him.

**SAME.**—*Infant Married Woman.—Disaffirmance.—Ratification.*—An infant married woman, a few days before she became of age, exchanged her land in this State for land in Kansas, the latter being conveyed to her husband. Possession was taken of the Kansas land and held for many years. While still in possession, the wife notified a remote grantee of her grantee of her disaffirmance of the conveyance, and commenced an action to recover possession. After the commencement of the action she joined her husband in conveying the Kansas land, the express purpose being to prevent its reclamation.

**Held,** that the plaintiff never arrived at the mental state constituting a disaffirmance, and that the conveyance of the property received was a complete ratification of the former conveyance.

From the Hendricks Circuit Court.

*C. Foley*, for appellant.

*L. M. Campbell, J. S. Duncan, C. W. Smith and J. R. Wilson*, for appellee.



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**MITCHELL, J.**—This is an appeal by Emily A. Buchanan from a judgment of the Hendricks Circuit Court, rendered in an action brought by her against William S. Hubbard to recover the possession of certain real estate which the plaintiff alleges she conveyed to a remote grantor of the defendant, while she was an infant, and which conveyance she avers she afterwards disaffirmed.

The material facts upon which the judgment is predicated, as they appear in the special finding of the court, are the following: On the 3d day of October, 1867, the plaintiff, being the owner of the land in controversy, agreed, through the agency of her husband, to exchange it with one Pennington for certain lands in the State of Kansas, she to receive in addition four hundred dollars in money. At the time the agreement and conveyance were made, the plaintiff was the wife of John Buchanan, and lacked about ten days of being twenty-one years old. Pennington, without the knowledge or consent of the plaintiff, executed a deed conveying the Kansas land to her husband, but before she delivered the conveyance for the Hendricks county land, in which her husband joined, she was apprised of the fact that the latter had been named as grantee in the conveyance from Pennington. The four hundred dollars were paid to the plaintiff's husband for her benefit by Pennington, who had no knowledge that she was not twenty-one years of age. Buchanan and his wife took possession of the Kansas land on the 15th day of October, 1867, and continued in possession until they sold it, in 1885. The Hendricks county land, through various mesne conveyances, came to the possession of Hubbard in 1880. In 1882, the plaintiff and her husband, being still in the possession of the land obtained from Pennington, caused a written notice to be served on the defendant Hubbard, to the effect that she disaffirmed the conveyance to Pennington, on the ground that she was an infant at the date of its execution. Subsequently she instituted this suit to recover the land, and after the commencement of the action

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she joined her husband in a conveyance of the Kansas land, which he sold and conveyed for \$3,800, with the intention to enable him to obtain the proceeds of the sale and prevent the land from being recovered from him in case she should recover the land in controversy. The only question presented for decision is, whether or not, upon the foregoing facts, the judgment that the plaintiff take nothing by her suit was right.

The plaintiff having paid the consideration for the Kansas land, her husband, who took the title in his name without her knowledge or consent, took it in trust for the benefit of his wife. *Mitchell v. Colglazier*, 106 Ind. 464, and cases cited.

It is insisted, however, that because the transaction involved a tract of land in the State of Kansas, the law of that State alone can be looked to in order to determine whether or not a trust resulted to the plaintiff, notwithstanding the conveyance to her husband in the manner found by the court. Hence it is argued, since the law of Kansas was not pleaded and proved, and because that State was territorially carved out of what is known as the "Louisiana purchase," neither the law of Indiana nor the common law can be applied to the case.

It is sufficient to say that the laws of a State to whose courts a party appeals for redress, furnish in all cases *prima facie* the rule of decision, and if either party claims the benefit of a different rule, since the courts are presumed to be acquainted only with their own laws, he who asserts the existence of a different rule, as applicable to his case, must aver and prove it, like other facts of which the courts do not take judicial notice. *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *St. Louis, etc., R. W. Co. v. Weaver*, 35 Kan. 412. As was said in *Crake v. Crake*, 18 Ind. 156: "Where a right is sought to be enforced in one State in relation to a subject-matter existing in a foreign State, and no foreign law is proved, and no common law rule ever

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prescribed, and no contract exists, \* \* \* the court will apply the law of the State in which it is sitting." *Monroe v. Douglass*, 5 N. Y. 447; *Whidden v. Seelye*, 40 Maine, 247; *Rorer Interstate Law*, 33-34.

In respect to general principles, the common law is presumed to be in force in most of the States, subject to such modifications as may have resulted from legislation or judicial construction. If these latter are not shown, the court applies the principles of the common law, as those principles are interpreted in the State where the trial is proceeding. *Rape v. Heaton*, 9 Wis. 328; *Legg v. Legg*, 8 Mass. 99.

It is true that as to those States in which there were established civil governments, or systems of domestic law, prior to their becoming territories or States of the Union, the presumption that the common law prevails is not indulged, and in such a case, in the absence of anything to the contrary being shown, the court will presume that the foreign law is the same as that which prevails here. The State of Kansas, although territorially a part of the Louisiana purchase, is not one of the States in which the civil law ever prevailed, and the principle sought to be interposed is, therefore, not applicable.

It is a universal rule, governing courts of chancery, in the absence of a modifying statute, that a trust results in favor of a purchaser who advances the purchase-money in the character of a purchaser and takes the title to real estate in the name of a third person, unless the relationship of the parties was such as to give rise to the presumption that the purchase was intended as a gift or advancement. 1 *Lewin Trusts*, 163. Accordingly, Lord Chief Baron EYRE, in *Dyer v. Dyer*, 2 Cox Ch. 91, declared that "The clear result of all the cases, without a single exception, is, that the trust of a legal estate \* \* \* results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common

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law, that where a feoffment is made without a consideration, the use results to the feoffor." Our statute has so modified the common law rule, that "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former," except as against the creditors of the person paying the consideration, or in case the alienee shall have taken the conveyance in his own name, without the consent of the person with whose money the consideration was paid, or where it was so taken in violation of some trust, etc. Sections 2974, 2975, 2976, R. S. 1881. Upon the assumption that the common law prevails in the State of Kansas, it is clear that a trust resulted in favor of the plaintiff, when her husband took the title to the Kansas land in his own name, she having paid the purchase-money, as purchaser. This is so according to the rule of the common law, whether the title was taken in the name of the husband with or without the consent of his wife.

Where a married woman pays the purchase-price of real estate and takes the title in the name of her husband, the common law raises no presumption that it was so taken as a gift or advancement to the latter. The presumption in such a case is, that the husband took the title as agent or trustee, and that he was to hold the land in trust for his wife, unless such presumption is rebutted by lapse of time, or by the facts and circumstances surrounding the transaction. *Armstrong v. Lindley*, 116 Ind. 295; *Hileman v. Hileman*, 85 Ind. 1; *Wales v. Newbould*, 9 Mich. 45; *Mellinger v. Bausman*, 45 Pa. St. 522; *McNally v. Weld*, 30 Minn. 209.

Whether, therefore, we apply the rules of the common law or assume that the common law has been modified by statute in the State of Kansas, since, in the absence of any proof showing what modifications had been made, we assume that the common law as modified and interpreted in that State is like our own, the conclusion follows that the plaintiff was

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the beneficial owner of the Kansas land, and that her husband held it merely as her agent or trustee. At all events, "We may not assume that the law of that State differs from ours, or that a court of equity in that State would fail to recognize and protect the equitable rights of a married woman to her separate property." *Holthaus v. Farris*, 24 Kan. 784; *Robards v. Marley*, 80 Ind. 185. It follows from what has preceded that the plaintiff was the beneficial owner of the land which was conveyed to her husband, as the consideration for that which she is now seeking to recover. She owned and with her husband occupied this land when she gave notice that she disaffirmed the deed to Pennington. She continued in possession until after the present suit was commenced, when, in 1885, pending the present action, her husband sold the Kansas property for \$3,800, and she joined him in a conveyance, intending that he should appropriate the proceeds of the sale and prevent the consideration which she had retained in specie for years after she had obtained her majority, from being reclaimed in case she succeeded in recovering the Hendricks county land. The question is, did the plaintiff disaffirm or confirm the conveyance made during infancy after she became of age?

That the deed of an infant is only voidable, and not void, is now the accepted rule of decision. And it is also firmly settled that a married woman may, any time during coverture, disaffirm a deed made by her during infancy. *Buchanan v. Hubbard*, 96 Ind. 1. But there is some diversity of opinion as to what acts, after reaching majority, will amount to an avoidance of the deed. It is sometimes asserted that the original contract must be vacated by some act equally solemn with the deed itself; while other authorities declare that any act distinctly and unequivocally manifesting an intention to disaffirm the deed, or dissent from the original engagement or transaction, is a sufficient avoidance. *Scranton v. Stewart*, 52 Ind. 68; *Lozey v. Bond*, 94 Ind. 67;

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*Richardson v. Pate*, 93 Ind. 423 ; *Sims v. Bardoner*, 86 Ind. 87 ; *Sims v. Everhardt*, 102 U. S. 300 ; *Irvine v. Irvine*, 9 Wall. 617 ; *Tyler Infancy*, 73.

At law an infant is not bound, as a condition precedent to the avoidance of his conveyance on attaining his majority, to restore the consideration received for property conveyed or transferred, provided the consideration has been wasted or lost during minority, or has become absorbed in other property. *Mustard v. Wohlford*, 15 Gratt. 329 (Ewell Lead. Cases, 142).

The effect of avoiding the deed is to entitle the infant, who has attained his majority, to recover his property ; while, on the other hand, so much of the specific consideration as remains in his hands may be reclaimed by the party to whom the conveyance had been made. *Carpenter v. Carpenter*, 45 Ind. 142 ; *Dill v. Bowen*, 54 Ind. 204.

The true rule seems to be, where the specific property received as a consideration, whatever it be, exists and remains in the hands of the infant at the time of disaffirmance, and is capable of return, the latter is bound to give it up. If, after arriving at age, he disposes of the property received, or asserts title to it as his own, he thereby confirms the contract, and can not recover that which he conveyed.

An infant, after attaining majority, can not disaffirm, so far as avoiding his own deed, and yet affirm by holding on to the specific consideration received, then remaining in his possession, and capable of restoration. He becomes a trustee for the other party, so far as the specific property is concerned, and he must respect his right of reclamation.

The authorities all concur in holding that, if one who has conveyed property during infancy is shown to have had possession of the consideration received in specie, upon arriving at age, and if it appears that he thereafter disposed of it, so that it can not be restored, or if he refuses, upon request, to surrender it, such conduct may amount to a confirmation or ratification of the conveyance, and defeat the recovery of

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the property conveyed. Having the consideration at the time of reaching his majority, if he thereafter puts it out of his power to restore it, he will not be permitted to avoid his conveyance. *Carpenter v. Carpenter, supra*; *Fitts v. Hall*, 9 N. H. 441; *Tyler Infancy*, 81.

An infant, upon coming of age, will not be permitted to affirm in part and avoid in part. *Hubbard v. Cummings*, 1 Maine, 11 (Ewell Lead. Cas. 161, and note). He will not be permitted to repudiate the contract so far as to reclaim his property, and yet affirm it to the extent of retaining or disposing of the property received by him in the transaction. If he avoids his contract he must be willing, at least, to restore the consideration, if in his possession and control. *Price v. Furman*, 27 Vt. 268. While it may be true, as has sometimes been asserted, that affirmance and disaffirmance are, in their nature, mental assents, the law can not regard that mental condition as a disaffirmance which assents to a reclamation of the land conveyed, but dissents from a restoration of the consideration then in hand. It is only when the mind assents to a restoration of the specific consideration possessed, as well as to the assertion of a claim to the property conveyed during minority, that it can be said an effectual disaffirmance has occurred. *Manning v. Johnson*, 26 Ala. 446 (62 Am. Dec. 732, and note); *Chandler v. Simmons*, 97 Mass. 508 (93 Am. Dec. 117, and note); *Tobey v. Wood*, 123 Mass. 89.

Giving notice of a disaffirmance, without offering to restore the consideration, although it remains in hand in kind, is, at best, an equivocal act. If afterwards, the infant being of age, the consideration is deliberately disposed of, it must be held that there was no *bona fide* purpose to disaffirm.

As we have seen, the plaintiff retained the consideration in specie until after the commencement of this suit, which, it may be observed, according to the frame of the complaint, is in the nature of an equitable action for general relief, as well as to recover the land, when she joined in a conveyance

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of the land received and held in trust for her, for the express purpose of preventing its reclamation. The court, therefore, very properly held that the plaintiff never arrived at that mental state when she disaffirmed her conveyance to Pennington. The sale of the Kansas property was a complete ratification of the conveyance of the land in controversy.

The judgment is affirmed, with costs.

Filed May 28, 1889.

119	196
121	380
119	196
126	371
119	196
120	556
119	196
137	144

No. 13,773.

THE CITY OF GOSHEN v. MYERS.

CITY.—*Public Bridge.—Duty to Repair.—Liability for Injury.*—It is the duty of a city, in this State, to keep a public bridge, within its limits and of which it takes control, in repair, although such bridge may have been originally built and maintained by the county as part of a public highway, and its failure to do so renders it liable to one who suffers injury without contributory negligence.

SAME.—*County Bridge.—Acceptance by City.*—A bridge constitutes part of the highway upon which it is situate, and a city, by taking charge of and improving the highway, accepts and becomes charged with the maintenance of a bridge constructed thereon by the county.

• From the Elkhart Circuit Court.

*J. A. Simmons, H. D. Wilson and W. J. Davis*, for appellant.

*W. L. Stonex and E. E. Mummert*, for appellee.

COFFEY, J.—It is averred in the complaint in this cause that the appellant is a municipal corporation, and that, on the 25th day of August, 1886, there was a public bridge within the corporate limits of the said city of Goshen, which



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it was bound to keep in repair; that it permitted said bridge to become so much out of repair that, on said day, while the appellee was driving across the same with due care and without any knowledge of its unsafe condition, the planks thereon broke under his horse and he was thereby injured, to the damage of the appellee.

The cause was put at issue by a general denial. At the request of the appellant the court found the facts specially and stated its conclusions of law thereon. The facts as found by the court are, substantially, that the city of Goshen was organized as a town in the year 1831, and in the year 1868 it was organized as a city under the general laws of the State providing for the organization of cities. The bridge named in the complaint was constructed by Elkhart county, on what is known as the Lima State road, twenty-seven rods east of the east end of Market street, in the city of Goshen, but within the corporate limits of said city. The land has never been platted into lots between the east end of Market street and the bridge, and on the east side of the bridge the land never was platted into lots, except a small addition fronting on the said Lima State road, fourteen rods east of said bridge, but buildings are erected and occupied on both sides of said Lima road east of the bridge, none being nearer than fourteen rods, but all being within the city limits of said city, the corporation line being one-fourth of a mile east of said bridge. The bridge was constructed in the year 1877, at a cost of twelve hundred dollars, which was paid out of the general county funds. Up to the date of the injury complained of, the bridge had never been repaired, either by the county or city, and it had been out of repair and dangerous for more than one year prior to the injury complained of, of which fact the city had notice. Prior to the injury set up in the complaint, the city of Goshen had taken charge of the Lima road within the city, and had graded it, as well as the streets in the addition to said city east of said bridge. At the time of the injury complained of, the

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appellee attempted to drive over said bridge with a span of horses and a wagon, and while doing so with due care, a worn out and decayed plank broke by reason of one of said horses stepping on it, and the horse partly fell through the hole made thereby and was permanently injured, to the appellee's damage in the sum of eighty-five dollars. The appellee had no knowledge of the dangerous condition of the bridge, and said injury occurred without any fault or negligence on his part.

Upon these facts the court stated as conclusions of law: 1st. That the appellant was liable for the injury to the appellee's horse. 2d. That the appellee was entitled to recover eighty-five dollars.

The appellant assigns as error: 1st. That the court erred in its conclusions of law. 2d. The complaint does not state facts sufficient to constitute a cause of action. 3d. The court erred in overruling the appellant's motion in arrest of judgment.

It is earnestly contended by the appellant, by its counsel, that it was not bound to keep the bridge now under consideration in repair, and, not being so bound, that it is not liable for any injury that resulted to the appellee's property by reason of any defect therein. On the other hand, it is contended by the appellee that cities in this State have the exclusive control of all public bridges within their corporate limits, and that they are bound to keep them in repair, and that they are liable for all injuries that may result to others without their negligence by reason of the neglect to perform that duty.

It will be seen that a correct solution of the question involved can only be had by ascertaining whether the city of Goshen was charged with the duty of keeping the bridge in repair, for if that duty rested upon the city, then, if it is provided by law with means of keeping the bridge in repair, it must respond to the appellee for the injury he has sustained by reason of its negligence.

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It has often been held by this court that it is the duty of the counties in this State to keep their bridges in repair, and that they are liable in damages to those injured, without their fault, for a neglect of that duty. *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Deprez*, 87 Ind. 509. But the county is not liable for a failure to keep in repair bridges over which the board of commissioners has no control.

In the case of *Board, etc., v. Deprez, supra*, it was said by ELLIOTT, J., who delivered the opinion of the court, that: "Where the complaint shows a bridge to be within a city the county can not be held liable, if, in such a case, it can be held liable at all, without affirmatively showing that the bridge belonged to the county, and that the county was charged with the duty of maintaining it. Under our statute it is quite clear that counties have no power to build bridges as part of the streets of a city, for that duty is expressly committed to the common council."

By section 3161, R. S. 1881, the common councils of cities are given the exclusive control and power over the streets, alleys, highways and bridges within the cities of this State, and it is expressly provided that no person residing in such cities shall be required or compelled to work on any road without the city, nor shall any property lying or being within the city be taxed for the purpose of working, opening, improving or repairing any road or bridge without the limits of such city. It was evidently the intention of the Legislature by the passage of this statute to leave all public bridges, within the limits of the cities in the State, of which they may take control, under the absolute management of the common council of such cities, and to charge them with the duty of keeping such bridges in repair.

In our opinion, it was the duty of the city of Goshen to keep the bridge under consideration in repair. The public bridges within the limits of the cities of the State, located upon the streets and public highways of the cities, constitute a part

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of such streets and highways, and such cities, where they take charge of the same, are liable to persons suffering injury or loss, without fault or negligence, for the neglect to keep such bridges in repair. *Lowrey v. City of Delphi*, 55 Ind. 250; *City of Delphi v. Lowery*, 74 Ind. 520.

It is urged by counsel for the appellant that there is no finding that the city of Goshen had ever accepted the bridge or the public highway, and, therefore, it was not required to keep the same in repair. Our attention has not been called to any law requiring the city to make any formal acceptance of such bridge and highway, and we know of none. It was, perhaps, a sufficient acceptance of the same to include them within the corporate limits of the city. But there is a finding that the city did take charge of the public highway upon which the bridge was built, and graded it. As the bridge constitutes a part of such highway, we know of no rule by which they can be separated. The acceptance of the one ought to carry with it the acceptance of the other. We do not think the court erred in its conclusions of law upon the facts as found.

It is disclosed by the record that the appellant filed a demurrer to the complaint in this cause, but before such demurrer was passed upon by the court, the same was withdrawn and an answer filed. It is not necessary that we should pass upon the question as to whether this complaint is sufficient to withstand a demurrer. We think it good after verdict, and that the court did not err in overruling the motion in arrest of judgment.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

MITCHELL, J., took no part in the decision of this case.

Filed May 28, 1889.

## Hornady, Administrator, v. Shields.

No. 5226.

## HORNADY, ADMINISTRATOR, v. SHIELDS.

119	201
123	402
119	201
131	58

**SUPREME COURT.**—*Assignment of Error Questioning Complaint for Review.*—

*Sufficiency of.*—It seems that an assignment of error in the Supreme Court, questioning for the first time the sufficiency of a complaint to review a judgment, must be merely for the reason “that the complaint does not state facts sufficient to constitute a cause of action.”

**REVIEW OF JUDGMENT.**—*Granting of Application.*—*Supreme Court will only Interfere when Injustice is Shown.*—The rule that the Supreme Court will not reverse a judgment on account of the action of the trial court in granting a new trial, unless it is apparent that great injustice has been done, applies also to the action of the lower court in granting an application for the review of a judgment, the object sought by both proceedings being the same, viz., a re-trial of the cause.

From the Scott Circuit Court.

*W. K. Marshall, W. T. Friedley, P. H. Jewett, S. S. Crowe and C. L. Jewett*, for appellant.

*G. V. Howk, J. K. Marsh and G. V. Howk, Jr.*, for appellee.

OLDS, J.—On the 30th day of November, 1871, appellant Hornady, administrator of the estate of Amos Clark, deceased, commenced an action in the court of common pleas of Scott county, Indiana, against the appellee, Shields, to recover the possession of 340 bushels of corn. Appellant alleged in his complaint that he was the owner of the corn described, which appellee had possession of, without right, and unlawfully detained from appellant. Demand for judgment for the recovery of the corn, and one hundred dollars damages for the detention thereof. A writ of replevin was duly issued and delivered to the sheriff, and the sheriff made return of such writ that by virtue thereof he had taken such corn from appellee on December 1st, 1871, and delivered the same to appellant upon his executing bond, as required

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by law. Afterwards, at the March term, 1872, of said court of common pleas, on appellee's motion, the court quashed the writ of replevin by virtue of which the sheriff had delivered the corn to appellant, but made no order for the return of the corn to appellee. Amended complaint was thereupon filed, and issue joined by answer in denial. The cause was tried by a jury, and a verdict was returned for appellant, assessing his damages at \$150, and over appellee's motion for a new trial judgment was rendered against him for such damages and costs.

On the 21st day of February, 1873, appellee commenced a suit in said court of common pleas of Scott county against said appellant to review and reverse the judgment aforesaid, for alleged errors of law appearing in the record thereof. Before any steps had been taken in said cause, the act took effect abolishing the common pleas court and transferring all the business pending in courts of common pleas to the circuit courts; and at the June term, 1873, of the Scott Circuit Court, the parties appeared, issue was joined, and, upon the hearing of said cause, the court found for the appellee and decreed that the aforesaid judgment should be reviewed, reversed and set aside, and the original cause for the recovery of the corn ordered re-docketed, which was accordingly done; and afterwards the cause was submitted to the court for trial, and the court found that the appellant was not the owner of any of the corn described in his complaint; that appellee was the owner, and entitled to have return, of one-half of such corn, of the value of \$84, and that the residue of such corn was the property of a third party, and that appellant could not make return of the corn taken from the appellee and delivered to appellant as aforesaid; and, over appellant's motion for a new trial, the court rendered judgment against him in appellee's favor for \$84 and costs. From this judgment this appeal is prosecuted.

The first error assigned is as follows: "The Scott Circuit Court erred in reversing and setting aside the judgment

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in favor of appellant below for one hundred and fifty dollars, and allowing a review of said case, because the complaint for review of said judgment did not show any error of law appearing in the proceedings and judgment for which a review could be allowed, nor did said complaint show any material new matter discovered since the rendition of said judgment for one hundred dollars and costs."

It is contended by counsel for appellee that this is not a proper assignment of error to present any questions as to the sufficiency of the complaint; that to question the validity of the complaint for review of the judgment, when, as in this case, there was no demurrer addressed to it in the court below, and no exception to the judgment for review, and the validity of the complaint for the first time questioned in this court, the assignment of error must be in strict conformity with the statute—that "the complaint does not state facts sufficient to constitute a cause of action." There is some force in the objection of counsel. Section 619, R. S. 1881, relating to proceedings in review of judgments, provides: "The defendant shall be notified of the filing of such complaint, and the parties shall proceed to form issues of law and fact as in other cases." Section 339, R. S. 1881, states the causes for which a defendant may demur to a complaint. One cause is, "That the complaint does not state facts sufficient to constitute a cause of action." Section 343, R. S. 1881, provides: "Where any of the matters enumerated in section 85 (section 339) do not appear upon the face of the complaint, the objection (except for misjoinder of causes), may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." The proceeding for review of a judgment is commenced by complaint, and must state error of law appearing in the proceedings and

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judgment, or facts discovered after the rendition of the judgment, sufficient to constitute a cause of action for review of the judgment. The words "material new matter" mean "material new facts," facts discovered after the rendition of the judgment material to a just determination of the case ; and a proper cause for demurrer to such complaint is the cause designated by the statute, and the objection to the complaint should be for the reason "that the complaint does not state facts sufficient to constitute a cause of action."

The statute declares that "When any personal goods are wrongfully taken, or unlawfully detained, from the owner or person claiming the possession thereof, or, when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof." R. S. 1881, section 1266.

In an action for possession of personal goods it would not be good practice to file, and the court would not sustain, a demurrer to a complaint in such an action in form, "that the complaint is insufficient for the reason that it does not show the goods were wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, nor that the goods had been taken on execution or attachment and are claimed by some person other than the defendant," or an objection to a complaint on appeal to this court assigned in that form. If such practice was permitted it might be followed in almost every instance. This is the same practice adopted in this case, and it is not proper practice. It is to avoid such verbose pleading that it is prescribed that a complaint may be tested by demurrer for specific causes. The code prescribes a mode of procedure in civil actions, and it prescribes the causes for which a demurrer may be filed to a complaint and what objections shall be waived if not taken by demurrer, and what shall not be waived and may be urged as objections to the complaint in this court. Such provisions aid in the dispensation of justice, and should be followed with



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reasonable strictness. The issues in a proceeding to review a judgment are to be formed in the same manner and governed by the same general rules of pleading as are prescribed in other civil cases. Yet in this case we do not deem it necessary to pass upon the sufficiency of this assignment of error.

The object sought in a proceeding for review is a new trial of the cause. The right to file the application, the complaint, is given to the party and it may be filed without leave of court, and it secures to the party a hearing by the court, and upon such hearing the court may reverse or affirm the judgment in whole or in part, or modify the same, as the justice of the case may require. The hearing, like an application for a new trial, is by the court; no right to a jury exists, and the same rule must be applied in reviewing the proceedings of the court in such a case as in the case of a motion for a new trial. This court will not reverse a case on account of the action of the lower court in granting a new trial, unless it is apparent that great injustice has been done. In some cases the courts say it will not be done "unless a flagrant case of injustice is made to appear." *Leary v. Ebert*, 72 Ind. 418, and authorities there cited. The object in both applications is the same—one is by complaint and the other by motion—the relief sought and granted is a new trial, whereby the original case will again be submitted to a court or jury for trial, and certainly the rule in this court as to setting aside the order of the court granting a new trial should be the same, whether the new trial has been granted on motion or on a complaint for review.

In this case there was a hearing of the cause on the complaint and the issue joined, a new trial granted and the cause again submitted to the court. No demurrer was filed to the complaint; no exceptions were taken and reserved in the hearing of the cause for review; no objection is made to the finding of the court or the order or judgment setting aside the original judgment and granting a new trial, and in this

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court, for the first time, an objection to the complaint is made. There does not appear from the record to have been any injustice done in reviewing the judgment and granting a new trial. The complaint alleges numerous errors of law in the proceedings and judgment. There does not appear to have been any finding as to the ownership of the property by the jury in the first trial, though they assessed the plaintiff's damages at \$150, and upon the second trial the court found the property, or a portion of it, to be the property of the defendant, and the remainder to be the property of a third person. When a complaint is first questioned in this court, every presumption will be indulged in favor of its sufficiency.

The only other alleged error discussed is the overruling of appellant's motion for a new trial, and the cause discussed, and for which it is contended a new trial should be granted, is, that the finding is not sustained by sufficient evidence. The particular reason urged is, that the trial court gave an improper interpretation and construction to a written contract introduced in evidence, but we are unable to tell what construction the court placed upon such contract. The evidence, we think, tends to sustain the finding, and we can not weigh the evidence to determine whether it preponderates in favor of the finding.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

BERKSHIRE, J., took no part in the decision of this cause.

Filed May 28, 1889.

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Burton v. The Connecticut Mutual Life Insurance Company.

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No. 12,211.

BURTON v. THE CONNECTICUT MUTUAL LIFE INSURANCE  
COMPANY.

119	207
119	454

119	207
159	646
159	649

**LIFE INSURANCE.—Action Upon Policy.—Complaint must Show Insurable Interest.**—A complaint upon a policy of insurance, issued to the plaintiff upon the life of another, is bad if it fails to aver that the plaintiff had an insurable interest in the life of the person insured.

**SAME.—Grandfather and Grandchild.—Insurable Interest.**—As a rule, a grandfather is under no legal obligation to support or provide for his granddaughter, and in an action by the latter upon a policy of insurance issued directly to her upon the life of her grandfather, the court can not infer, as a matter of law, from an averment of the relationship between the parties, such an insurable interest in the life of the grandfather as will uphold the policy.

**SAME.—Facts Dehors the Policy.—Showing of.**—One who accepts a policy of insurance issued to him upon the life of another, will not be permitted to allege and prove an existing state of facts *dehors* the policy to control its legal effect.

From the Vanderburgh Superior Court.

*C. L. Wedding, F. M. Finch and J. A. Finch*, for appellant.

*A. Gilchrist and C. A. DeBruler*, for appellee.

**BERKSHIRE, J.**—The complaint is in two paragraphs, to both of which demurrers were filed and sustained, and judgment rendered against appellant for want of a complaint.

The errors assigned bring in review the ruling of the court below sustaining the demurrers to the paragraphs of the complaint.

The foundation of the action is a policy of insurance issued and made payable to the appellant directly by the appellee, upon the life of one Willard Carpenter. The policy recites the payment of the advanced premium by the appellant, and her promise to pay future premiums, as therein stipulated, as the consideration for the execution of the policy. There is an allegation in the paragraphs of com-

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Burton v. The Connecticut Mutual Life Insurance Company.

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plaint that, when the policy issued, the appellant was but six years of age, and that Willard Carpenter, the insured, was her grandfather, and, desiring to make provision for her, he procured from the appellee, for a valuable consideration, the policy sued upon, and that it was his intention that she should occupy the place of a beneficiary, or appointee, and receive the proceeds when payable.

Conceding all that is stated in this allegation to be true (and if material the demurrer admits its truth), the facts thus stated can not influence the rights of the parties under the policy. When the appellant accepted the policy and undertook to enforce it, she accepted it as written, and will not be permitted to allege and prove an existing state of facts *dehors* the writing to control its legal effect. This is a proposition so well authenticated that we do not deem it necessary to cite authorities.

There is no allegation in either paragraph of complaint to show that the appellant had an insurable interest in the life of her grandfather. Such an allegation is necessary to a good cause of action. *Continental Life Ins. Co. v. Volger*, 89 Ind. 572. In that case the relationship was one degree nearer than in the present case, the policy having been issued to the daughter upon the life of her mother.

In *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. 247, the court says: "It must be considered well settled at present that at the common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party insured has at the time an insurable interest in the property insured. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to sustain a cause of action." May Ins., section 587; *Ruse v. Mutual Benefit Life Ins. Co.*, 23 N. Y. 516.

In *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, the following instruction was asked by the defendant and refused by the trial court: "That to entitle the plaintiff to recover in this action, he must show some insurable interest in the

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life of John T. Anderson, the insured, and that in the absence of any evidence, showing, or tending to show such insurable interest, the jury must find for defendant." After a discussion of the question presented by this instruction, the court says: "The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed." The foregoing was an action upon a life policy issued to an uncle upon the life of his nephew. See *Guardian, etc., Ins. Co. v. Hogan*, 80 Ill. 35 (22 Am. Rep. 180). In the latter case the relationship was that of father and son.

As a rule, a grandfather is under no legal obligation to support or provide for his grandchild, and though the relationship may be stated in the complaint, from this fact alone the court can not, as a matter of law, infer such an insurable interest in the life of the grandfather as will uphold a policy issued upon his life directly to the grandchild.

In *Rombach v. Piedmont, etc., Ins. Co.*, 35 La. Ann. 233 (48 Am. Rep. 239), the court says: "The insurable interest in the life of another is a pecuniary interest. A policy of insurance, procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy and therefore void. \* \* The books formulate the general principle somewhat in this way: When the insurable interest arises, or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. \* \* Thus it has been held that a sister had an insurable interest in the life of her brother, where the fact was that she had been supported by him (*Lord v. Dall*, 12 Mass. 115), and a father in the life of his minor son, because entitled to his earnings (*Mitchell v. Union Life Co.*, 45 Maine, 104); but that he has none from mere relationship to a son (*Halford v. Kymer*, 10 B. & C. 724), nor does the mere rela-

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tion of brother suffice to furnish an insurable interest. *Lewis v. Phenix Ins. Co.*, 39 Conn. 100."

In accordance with this doctrine, it has been decided in Pennsylvania that a son has an insurable interest in the life of his father, because under the poor laws of that State there is a legal liability resting upon the son for the maintenance of the father, when the latter is unable to work. *Reserve Mut. Ins. Co. v. Kane*, 81 Pa. St. 154 (22 Am. Rep. 741). See *Keystone, etc., Ass'n v. Norris*, 115 Pa. St. 446 (2 Am. St. Rep. 572).

To the same effect is *Warnock v. Davis*, 104 U. S. 775. Judge FIELD says: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

In commenting upon the rule as laid down by Judge FIELD, the annotator, in a very full and able note to the case of *Morrell v. Trenton, etc., Ins. Co.*, 10 Cushing, 282, and found in 57 Am. Dec. 92, says: "If we correctly understand the doctrine here laid down, it amounts simply to this, that an

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insurable interest in another's life need not be pecuniary in the sense of being susceptible of definite 'pecuniary estimation,' nor in the sense of being founded upon any mere pecuniary relation, but that it may rest solely upon ties of blood or affinity, and yet that the mere existence of such a tie is not of itself sufficient to constitute an insurable interest, but that the tie must be such as to give reasonable ground for an expectation of benefit or advantage from the continuance of the life. By 'benefit or advantage,' in this connection, we understand that it must be a material or physical 'benefit or advantage.' That is to say, a mere sentimental benefit, arising from a gratification of the affections by the prolongation of the life assured will not suffice. The expected benefit must consist in service, maintenance, or the like. This is equivalent to saying that it must be a pecuniary benefit, as distinguished from a mere sentimental or moral gratification. Thus understood, the doctrine of these cases, which professedly reject the test of pecuniary interest, is not substantially different from that held in other cases."

If the policy had issued to Willard Carpenter and recited an agreement on his part to pay the premiums, the appellant being named therein as the beneficiary, or appointee, to receive the proceeds, or had it issued to him and the proceeds been made payable to him or his assigns, and thereafter assigned to the appellant, we would have for our consideration a very different case than the one before us. In that kind of a case the question of insurable interest could not arise, for every person has an insurable interest in his or her life. *Elkhart Mut., etc., Ass'n v. Houghton*, 103 Ind. 286; *Provident L. Ins. Co. v. Baum*, 29 Ind. 236, and cases belonging to the same class, are not in conflict with the conclusion we have reached.

Judgment affirmed, with costs.

Filed May 29, 1889.

119	212
121	281
119	212
126	304
127	50
119	212
124	411

No. 5,123.

SMITH v. HELLER ET AL.

PLEADING.—*Action Originating Before Justice of Peace.—Complaint.—Motion in Arrest.*—A complaint, in an action originating before a justice of the peace, which avers that the defendant “justly owes the plaintiff sixty-three and 21-100 dollars, and that the payment of the said sum has been unreasonably delayed, and that there is the further sum of eleven and 26-100 dollars as interest on the same,” is good on a motion in arrest of judgment in the circuit court.

INSTRUCTIONS TO JURY.—*Supreme Court.—Practice.*—Where the record contains neither the evidence nor a statement of its character and tendency, questions made upon rulings on instructions will not be considered.

VERDICT.—*Answers to Interrogatories.—When Controlling.*—It is only when the uncontradicted and consistent answers of the jury to interrogatories entitle a party to a judgment that they will prevail against the general verdict.

From the Allen Circuit Court.

R. S. Taylor, A. Purman and S. L. Morris, for appellant.

R. Lowry, for appellees.

ELLIOTT, C. J.—This action originated before a justice of the peace and was carried by appeal to the circuit court.

The complaint avers, among other things, that the defendant “justly owes the plaintiffs the sum of sixty-three and  $\frac{21}{100}$  dollars, and that the payment of the said sum has been unreasonably delayed, and that there is the further sum of eleven and  $\frac{26}{100}$  dollars as interest on the same.” The motion in arrest made by the defendant was properly overruled. It is doubtful whether if the action had been commenced in the circuit court the complaint would not have been good after verdict, and, as the action was commenced before a justice of the peace, there is certainly no doubt that the complaint is sufficient.

The evidence is not in the record, nor is there any state-



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Honey Creek School Township v. Barnes *et al.*


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ment of its character and tendency, and we can not, therefore, examine the questions made upon the rulings on the instructions. The rule on this subject is too well settled to require the citation of authorities.

The answers of the jury are contradictory, and while some of the answers are favorable to the appellant, others are directly against him. It is only where the uncontradicted and consistent answers entitle a party to a judgment that they will prevail against the general verdict. All reasonable in-  
tendments will be made in favor of the general verdict, and none in favor of the answers to special interrogatories. *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412; *Redelsheimer v. Miller*, 107 Ind. 485; *Rice v. Mamford*, 110 Ind. 596; *Fort Wayne, etc., R. W. Co. v. Beyerle*, 110 Ind. 100; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

Judgment affirmed.

Filed May 29, 1889.

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No. 13,636.

## HONEY CREEK SCHOOL TOWNSHIP v. BARNES ET AL.

**TOWNSHIP TRUSTEE.**—*Common Schools.*—*Power to Purchase Books.*—A township trustee has no authority, either under section 4444, R. S. 1881, or under any other law of this State, to purchase, at the expense of the township, text-books for the use of the pupils attending the public schools of the township. *Jackson School Township v. Hadley*, 59 Ind. 534, distinguished.

**SAME.**—*Complaint Against Township.*—*Sufficiency of.*—A complaint against a township to recover for books alleged to have been purchased by the trustee and used in the schools of the township, is bad unless it shows that the books were such as the trustee had power to buy.

**SAME.**—*Notice of Trustee's Powers.*—School townships are corporations with limited statutory powers, and all who deal with a trustee of such a

119	213
123	73
119	213
194	79
197	80
119	213
140	585
119	213
146	475
147	236
119	213
164	103
119	213
168	390

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Honey Creek School Township v. Barnes *et al.*

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township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law.

From the Howard Circuit Court.

*J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.*

*J. F. Elliott and L. J. Kirkpatrick, for appellees.*

OLDS, J.—This action is brought by the appellees against the appellant. The complaint is in one paragraph, and alleges that, on the 1st day of February, 1884, one Benjamin King, at that time the legal and acting school trustee of said school township, bought of the plaintiffs books for the use of the schools of said township, that said books were received and used by the schools of said township, and that the same were necessary for such township in its schools, at and for the price of \$56.25; that, upon said date, said trustee, as such, executed to the plaintiffs, in the firm name and style of A. S. Barnes & Co., his written obligation to pay the same out of the special school fund of said township on or before the 20th day of January, 1885, with eight per cent. interest from the maturity thereof, a copy of which is filed with the complaint, marked exhibit "A," and made a part of the same. It is further averred that George W. Kemp was elected trustee, as the successor of King, and refused to pay the amount. The order executed by the trustee, King, and made a part of the complaint, is as follows:

"Feb. 1st, 1884. This is to certify that there is due from this township to A. S. Barnes & Co., or order, fifty-six and  $\frac{25}{100}$  dollars for books bought for schools of this township, payable out of the special school funds of the township, on or before the 20th day of January, 1885, with interest at eight per cent. per annum from maturity.

"HONEY CREEK SCHOOL TOWNSHIP, HOWARD  
COUNTY, INDIANA.

"Per BENJAMIN KING, Township School Trustee."

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Appellant filed a demurrer to the complaint, which was overruled and the ruling assigned as error.

The question presented is as to whether a township school trustee has authority to purchase school books and bind the school township for the payment of the same.

It is contended by counsel for appellee that section 4444, R. S. 1881, authorizes a township trustee to purchase necessary school books for the schools of his township. So much of said section as is material in the consideration of this case is as follows:

“The trustees shall take charge of the educational affairs of their respective townships, towns, and cities. They shall employ teachers; establish and locate, conveniently, a sufficient number of schools for the education of the white children therein; and build, or otherwise provide, suitable houses, furniture, apparatus, and other articles and educational appliances necessary for the thorough organization and efficient management of said schools.”

It is further contended by counsel that such authority is fully established by an unbroken line of decisions of this court. We have examined the decisions cited by counsel, and others bearing upon the authority vested in trustees, and there is but one decision that tends to uphold the right of the trustee to purchase books, and we think there is a clear distinction between the decision in that case and the question presented in this. In the case of *Jackson School Township v. Hadley*, 59 Ind. 534, the indebtedness was for ten Webster's dictionaries. The decision in that case was based upon the the cases of *Jackson Township v. Barnes*, 55 Ind. 136, and *Sheffield School Township v. Andress*, 56 Ind. 157. The indebtedness in the case of *Jackson Township v. Barnes*, *supra*, was for “Monteith's Maps,” and in the case of *Sheffield School Township v. Andress*, *supra*, the order was given for work done on a school building. So far as authority for purchasing books of any character, the case of *Jackson School Township v. Hadley*, *supra*, stands alone. In

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Honey Creek School Township v. Barnes *et al.*

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our opinion it is going to the very border line to construe this section of the statute as authorizing the purchase of maps, charts, tellurians and other like articles and apparatus, and dictionaries and books of reference; but there are greater reasons for placing such construction upon this section than to construe it to authorize the purchase of such books as there is sought to be a recovery for in this action. Blackboards, charts, maps, tellurians and dictionaries are a class of articles, apparatus and books which are not required for each individual scholar, but one of each would be sufficient, in most instances, for the whole school, and could be used by the teacher in giving instructions to the pupils. No person being required to furnish such common property for the benefit of the whole school, they can only be supplied by the trustees. The authority, certainly, can not be extended to the right of purchasing general text-books for the use of each of the individual pupils.

The complaint, in this case, alleges the purchase of books for the use of the schools, and the order is for books for schools of the township. It having been held by this court, in the case of *Jackson School Township v. Hadley, supra*, that the trustee has the right to purchase dictionaries for the use of the schools, the sufficiency of the complaint depends upon whether it is necessary to allege, specifically, that the purchase was of such books as the trustee had the right to purchase, or whether it will be presumed from the allegations of the complaint that they were such books as the trustee had the right to purchase. The authority of trustees being limited, and they having a right to make only such contracts and purchases as they are empowered by law to make, the complaint should affirmatively show the purchase and contract to have been one which the trustee was, by law, authorized to make. The complaint is not good, and the demurrer should have been sustained.

The uncontroverted evidence in the case shows the books purchased to be seventy-five copies of Monteith's Popular

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Science Readers ; that they were used by the pupils in their reading exercises, as contended by counsel, " to give the pupils a change in reading exercises, to draw out new thoughts, and an additional incentive to new exertion." The same could be said of any new readers or text-books purchased by the trustee and put in use in the schools ; they would produce a change, and stimulate the mind and divert the line of thought from the subjects in the old books ; but it must be admitted, and it is too plain to require argument to demonstrate the proposition, that if the trustee has the authority to purchase this class of books, he may purchase any other readers, spelling-books, or any other class of text-books ; that he may supply all the text-books used in the schools of his township at the expense of his school township. This may be the proper system for our State to adopt—that is not for us here to determine—but the trustees can not pursue such a course and bind the school township without some further legislation on the subject. Such authority is not given by section 4444, R. S. 1881. Some genius may have constructed the language of that section with a view to developing a latent meaning and interpretation to that effect after the passage of the act, but such meaning, if it can be gathered from the words used, is so far distant, and so thoroughly secreted beneath the well understood meaning of the language used, that we are satisfied the Legislature never understood it to give authority to trustees to purchase for the use of schools the general text-books used by the individual pupils, and never intended that such authority should be granted by said section.

School townships are corporations with limited statutory powers, and all who deal with a trustee of a school township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law. *Reeve School Tp. v. Dodson*, 98 Ind. 497 ; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464 ; *Axt v. Jackson School Tp.*, 90 Ind. 101 ; *Bloomington School Tp. v.*

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The Indianapolis and Vincennes Railroad Company v. Lewis *et al.*

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*National School Furn. Co.*, 107 Ind. 43. The fact that the books were received by the trustee, and used under his direction, creates no liability. It follows that the finding of the court was not sustained by the evidence and was contrary to law, and the motion for a new trial should have been sustained.

Judgment reversed, at the costs of appellees, with directions to the court below to sustain appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

Filed May 29, 1889.

119	218
122	400
119	218
125	504
126	335
126	303
127	59
119	218
133	415
119	218
134	208
136	71

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No. 13,603.

THE INDIANAPOLIS AND VINCENNES RAILROAD COMPANY v. LEWIS ET AL.

**RAILROAD.**—*Right of Way.*—*Width.*—*Contract.*—*Evidence.*—*Acts and Declarations of Parties.*—Where a railroad company acquires a right of way by contract with a land-owner, and the width of the land granted for such right of way is not fixed by the contract, the declarations and acts of the parties are admissible in evidence to fix such width.

**VERDICT.**—*Answers to Interrogatories.*—*When Control General Verdict.*—Answers of the jury to interrogatories overthrow the general verdict only when there is such antagonism upon the face of the record as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause.

From the Morgan Circuit Court.

*S. O. Pickens*, for appellant.

*W. R. Harrison*, for appellees.

**COFFEY, J.**—On the 16th day of September, 1867, John

119	218
152	300
153	302
119	218
158	663
158	664
119	218
159	232
159	233

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H. Thoruburgh executed and delivered to the appellant the following instrument of writing :

“ I, John H. Thornburgh, of the county of Morgan, and State of Indiana, for and in consideration of the advantages which may or will result to the public in general, and myself in particular, by the construction of the Indianapolis and Vincennes Railroad, as now surveyed or as the same may be finally located (provided it be on the old grade of the Indianapolis branch of the N. A. & S. R. R.), and for the purpose of facilitating the construction and completion of said road, do hereby, for myself and my heirs, executors, administrators and assigns, release, relinquish and forever quitclaim to the Indianapolis and Vincennes Railroad Company the right of way for so much of said railroad as may pass through the following described field, parcel or lot of land in the county of Morgan, in the State of Indiana, that is to say : The west half of the southwest quarter of section 30, in township 14 north, range 2 east ; also, the east half of the southeast quarter of section 25, township 14 north, range 1 east, and the right to cut and remove for my use such trees as may be standing near and liable to fall upon the track ; said company to allow me to join my fences on each side of said land, and such cross-fences as are necessary, under the directions of the engineer, so as not to obstruct the use of the tracks ; two pits in said railroad tracks to be put in by said company at their own expense, provided I give them notice that I require the same before the ties are laid. Said company, also, to give myself and heirs the exclusive use of any of the lands hereby released, not needed for the use of the road for the time being, after the same shall be constructed, so as in no wise to obstruct the road.

“ Witness my hand and seal this 16th day of September, 1867.                      JOHN H. THORNBURGH.” [SEAL]

After the execution of the above release, Thornburgh conveyed the land therein described to Giles B. Mitchell, subject to the right of way thereby conveyed. Mitchell died in the

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The Indianapolis and Vincennes Railroad Company *v.* Lewis *et al.*

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year 1878, and the land descended to the appellee Emma G. Lewis, as one of his heirs at law.

The complaint in this cause is in two paragraphs, the first alleging that it was agreed between the appellant and the said Thornburgh that he should convey to the appellant thirty feet only for a right of way, and that by mistake and inadvertence the scrivener who prepared said release omitted to insert therein said agreement, when in truth and in fact it was the intention of both parties thereto that the said release should contain words limiting the quantity of land thereby conveyed to thirty feet, or fifteen feet on each side of the center of said railroad.

The second paragraph of the complaint proceeds upon the theory that the grant of the right of way, above set out, conveys so much of the land only as should be needed by the appellant in the construction and operation of its road, and it avers that the appellant constructed a single track over said land in the year 1867, and took possession of fifteen feet on each side of the center of said track; that the said Thornburgh and his grantees, from the said date to the 5th day of May, 1885, have continuously occupied all the remainder of said land, cultivating the same in corn, wheat and other annual crops; that thirty feet is all that is needed by the appellant for the use of its road, and all that will ever be needed for the operation of the same; that, on the 5th day of May, 1885, the appellant, with strong hand and by force, took possession of one hundred feet of said land and enclosed the same with a strong wire fence, and has ever since excluded the appellees therefrom. This paragraph seeks to recover the possession of all said one hundred feet, except the thirty originally occupied by the appellant, and damages for the detention of the same.

The appellant filed an answer and counter-claim to this complaint, and, issues being joined by proper pleadings, the cause was submitted to a jury, who returned a general verdict for the appellees, together with answers to interrogato-



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ries. The appellant moved the court for judgment in its favor on the answers to the interrogatories, which motion was overruled and the appellant excepted. The appellees recovered judgment on the general verdict for the possession of the land claimed, and for damages for the detention of the same.

The error assigned is, that the court erred in overruling the motion of the appellant for judgment in its favor on the answers to the interrogatories notwithstanding the general verdict. The interrogatories and the answers thereto are as follows :

“ 1. Did John H. Thornburgh execute and deliver to the defendant, the Indianapolis and Vincennes Railroad Company, the release of right of way of September 16th, 1867, set out in the complaint and counter-claim? Answer—Yes.

“ 2. Did both the railroad company and Thornburgh intend that the right of way for said railroad should be written and described in said release as thirty feet wide, fifteen feet on each side of the center line of said railroad as it passes through said land? Answer—No.

“ 3. Was John H. Thornburgh the owner of the land described in said release at the time of its execution? Answer—Yes.

“ 4. Was said Indianapolis and Vincennes Railroad Company organized and incorporated on the 18th day of December, 1865, under the general railroad law of the State of Indiana? Answer—Yes.

“ 5. Did said Indianapolis and Vincennes Railroad Company, under the provisions of said release, enter upon the land described in said release and construct said railroad over the same, as it was located at the time, in the years 1867 and 1868, and has said railroad been operated thereon ever since? Answer—Yes.

“ 6. Did said Thornburgh sell and convey the land described in said release to Giles B. Mitchell on the 14th day

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of October, 1869, excepting in said conveyance the right of way of said railroad? Answer—Yes.

“7. Did the plaintiff, Emma G. Lewis, inherit her title to said land by descent from said Giles B. Mitchell, as the daughter and heir of said Mitchell, subject to said right of way? Answer—Yes.

“8. Did the defendant, on or about the 5th day of May, 1885, take possession of, and enclose with fences, a strip of land three rods wide on each side of said railroad, as it passes over said land, under a claim of right under the terms of said release? Answer—Yes.

“9. How many acres are embraced in the ground taken possession of May 5th, 1885, in addition to what had been taken prior thereto? Answer—Four acres.

“10. What is the rental value per year per acre of said additional land so taken possession of? Answer—Seven dollars.”

As to whether the court erred in overruling the motion of the appellant for judgment on the answers to interrogatories, notwithstanding the general verdict, depends upon the construction to be placed on the release above set out. It is contended by the appellant that, upon the execution of that release and the taking possession of and constructing its line of railway over the land described, it became vested with the title to a strip of land across said tract six rods wide, three rods on each side of the center line of its railway track, as and for a perpetual right of way for its railroad.

The appellant company was organized under the general law of the State providing for the organization of railroad companies, and had it proceeded to condemn the right of way over the land described in the release, the question as to the width of such right of way would be free from doubt; but as the right of way was acquired by contract, it must be clear that the rights of the parties are to be determined by the terms of the contract itself.

Under the statutes in force at the date of the execution of

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this release, the appellant had the right to condemn, for its right of way over the lands therein described, a strip not to exceed six rods in width, but this it did not do. It chose to contract with Thornburgh for such right of way, and while such contract does not state the width of the right of way acquired, it would, perhaps, in the absence of anything done or said by the parties, be construed in the light of the law then in force upon that subject. *Indianapolis, etc., R. W. Co. v. Rayl*, 69 Ind. 424; *Campbell v. Indianapolis, etc., R. R. Co.*, 110 Ind. 490. But in a case like this, where the grant of the right of way does not fix its width, the declarations and acts of the parties are admissible in evidence to fix such width. *Indianapolis, etc., R. R. Co. v. Reynolds*, 116 Ind. 356.

On a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, every reasonable presumption will be indulged in favor of the general verdict, and if, by any reasonable hypothesis, the answers can be reconciled with the general verdict, the latter must stand. They override the general verdict only when both can not stand together, the antagonism being such, upon the face of the record, as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause. *Amidon v. Gaff*, 24 Ind. 128; *Baldwin v. Shuter*, 82 Ind. 560; *Northwestern Mutual Life Ins. Co. v. Heimann*, 93 Ind. 24.

Guided by these well established rules, we have come to the conclusion that the general verdict in this case must stand. We must presume that, under the issues in the case, proof was made which warranted the jury in finding that the appellant was entitled to no more than they gave it. Under such a presumption the general verdict and the answers to the interrogatories are not inconsistent with each other.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed May 29, 1889.

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Harshman v. Armstrong et al.

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No. 13,747.

## HARSHMAN v. ARMSTRONG ET AL.

ATTORNEY AND CLIENT.—*Lien for Services.—Preference of Creditor.*—Where attorneys, under an agreement with their client, A., give notice of a lien for \$2,000 upon a decree of foreclosure in favor of A., \$1,200 being for services in the foreclosure proceeding and \$800 for other services, and upon a sale under the decree are permitted by A. to retain the full amount of his indebtedness to them, they hold the entire sum so received free from the demands of a creditor of A. who had no lien upon the fund so applied, even if they did not acquire a valid attorney's lien on the decree in excess of \$1,200.

From the Clinton Circuit Court.

*J. N. Sims*, for appellant.

*J. V. Kent*, for appellees.

MITCHELL, J.—This was a proceeding by Harshman to subject certain money alleged to be in the hands of the attorneys of Armstrong to the payment of a judgment recovered by the former against the latter.

It appears that Harshman recovered a judgment against Armstrong, in the circuit court of Clinton county, for \$547, in the year 1880. Subsequently, in June, 1883, Armstrong, after protracted litigation, obtained a decree foreclosing an indemnity mortgage upon certain property owned by Catterlin. The property was ordered to be sold to pay a judgment in Armstrong's favor, amounting to about \$4,300. McClurg & Kent, Armstrong's attorneys in the litigation with Catterlin, gave due notice that they held a lien upon the decree for \$2,000 due them for legal services in obtaining the judgment and decree. The court found that the services of the attorneys, in obtaining the decree, were reasonably worth \$1,200; that Armstrong owed them \$800 besides, for other legal services, and that the notice of the lien for \$2,000 was entered in pursuance of an agreement between Armstrong

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Harshman v. Armstrong *et-al.*

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and his attorneys that the latter should take a lien on the judgment for the whole amount due them.

Subsequently the sheriff sold Catterlin's property in pursuance of the decree, and the attorneys received the \$2,000 due them from Armstrong, and for which they had taken a lien as above, and the question now is whether the appellant, Harshman, can subject the \$800, paid to the attorneys in the manner above mentioned, to the satisfaction of his judgment, it having been made to appear that Armstrong was insolvent and without any property subject to execution at the time this proceeding was commenced.

It is contended that the judgment must be reversed, because it is said that the attorneys could only acquire a lien on the decree for the value of their services in obtaining it, and that they could not acquire a lien for the \$800 due them for legal services in other litigation. Conceding this to be so, still it does not help the appellant's case. If Armstrong actually owed his attorneys \$2,000, which is an uncontroverted fact in the case, it was competent for him to pay them, or to permit them to retain that amount out of the money collected, whether they had a lien on the decree or not.

The appellant had no lien or other claim on the judgment, or on the proceeds of the sale. He is therefore not in a situation to raise any question about the lien of the attorneys. If they held a valid claim against Armstrong for the amount retained by them, other creditors, who had no lien upon the fund, can raise no question as to their right to receive payment of their debt.

It has often been held that a debtor, so long as he has the control and disposition of his property, has a right to prefer one creditor, to whom he owes an honest debt, to the exclusion of others, whose claims are equally meritorious. *Gilbert v. McCorkle*, 110 Ind. 215, and cases cited; *Fisher v. Syfers*, 109 Ind. 514; *Winslow v. Wallace*, 116 Ind. 317.

The only question properly before the court was, did

## Kern v. Bridwell.

Armstrong actually owe the defendants the amount which, by mutual agreement with him, they retained out of the judgment? That inquiry having been found in the affirmative, the judgment rendered by the court followed necessarily.

There was no error in admitting evidence to show that the claim of \$800, in addition to that arising out of the services rendered in obtaining the decree, was a valid claim. It appearing that there was a general balance of \$2,000 due the defendants as attorneys, it was their right to obtain payment of it, and that they did so out of a fund upon which the appellant had no lien was not legally a fraud upon the latter. *Van Etten v. State*, 24 Neb. 734.

Judgment affirmed, with costs.

Filed May 29, 1889.

119	226
120	229
119	226
128	554
129	410
119	226
138	506
139	36
119	226
151	542
119	226
153	608
119	226
154	125
154	580
154	635
156	480

No. 13,560.

## KERN v. BRIDWELL.

ARGUMENT OF COUNSEL.—*Misconduct.—When Error can not be Alleged.—*

Where the trial court, upon objection being made to improper argument, does all in its power to relieve the party from any injury likely to result from the misconduct of counsel, there is no action upon which error can be predicated.

EVIDENCE.—*Exclusion of.—Question on, How Reserved.—Practice.—*In order to reserve a question upon the exclusion of testimony, a pertinent question must be propounded to the witness, and, upon objection, a statement made to the court as to the testimony which will be given in answer thereto, and an exception must be reserved at the time the ruling is made.

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Kern v. Bridwell.

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**SLANDER.—Unmarried Female.—Abortion.—Examination of Person by Medical Experts.**—Where, in an action by an unmarried woman for slander, it is alleged that the defendant had spoken of the plaintiff that she was a whore, and had become pregnant, and had suffered an abortion to be procured upon her, the defendant is not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts.

From the Lawrence Circuit Court.

*M. F. Dunn* and *G. G. Dunn*, for appellant.

*G. W. Friedley* and *J. Giles*, for appellee.

OLDS, J.—This is an action for slander, brought by appellee against the appellant. The complaint charges the defendant with having spoken of and concerning Addie M. Bridwell, an unmarried female under twenty-one years of age, that she was a whore; that she had slept with one McCain, and he had had sexual intercourse with her, and she had become pregnant and then procured or suffered an abortion to be procured upon her.

The defendant answered by general denial and a plea of justification, on the ground of the truth of the allegations.

There was a trial, resulting in a verdict and judgment for the plaintiff, the appellee.

The defendant filed a motion for a new trial, which was overruled, and he reserved exceptions to the ruling and appeals to this court. The only error assigned is the ruling on the motion for a new trial.

The first ground of complaint is the misconduct of counsel for appellee in the opening argument of the case to the jury. Objection was made to the statements of counsel at the time, and the court called the counsel to order and informed the jury that the statements were improper, and that the jury must disregard them; it also charged the jury to disregard all irrelevant statements of counsel.

The court did all in its power to relieve the party from any injury likely to result from the misconduct of counsel, and there is no action of the court to which an exception

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Kern v. Bridwell.

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can be taken, and there was no error committed by the court. *Grubb v. State*, 117 Ind. 277.

The next question discussed by counsel is the exclusion of certain testimony. The record shows that the defendant produced a Mrs. Kern as a witness, who testified as to the condition and appearance of the plaintiff, Addie M., at the time she was charged by the defendant with having been pregnant, and then asked the witness whether, from the facts stated, the plaintiff was or was not pregnant. Objection was made by plaintiff and sustained by the court, to which ruling defendant at the time objected.

The record also shows that the defendant produced one John Boyd as a witness, who testified to having seen the plaintiff, Addie M., in December, 1883, and described her condition. Whereupon the defendant offered to prove by the witness that from what he saw of her, and from her appearance in December, 1883, the plaintiff was, in his opinion, pregnant at that time. There was no question propounded to Boyd calling for an answer as to the pregnancy of the plaintiff, Addie M., nor did defendant state what he proposed to prove by Mrs. Kern in answer to the question propounded to her. In neither case is there any question presented as to the correctness of the ruling of the court.

The rule has been long and well established, that, to reserve any question on the ruling of the trial court in excluding the testimony of a witness, there must be a pertinent question propounded, and, upon objection, a statement made to the court as to the testimony which such witness will give in answer thereto, and an exception reserved at the time of the ruling. The rule was in no way complied with in this case, and no question is presented by the record as to the exclusion of the testimony. This rule of practice is so well established and so reasonable that there is no cause to deviate from it. *Judy v. Citizen*, 101 Ind. 18; *Higham v. Vanosdol*, 101 Ind. 160; *Beard v. Lofton*, 102 Ind. 408; *Ralston v. Moore*, 105 Ind. 243.



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Kern v. Bridwell.

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The only other error complained of by counsel is the refusal of the court to order the plaintiff, Addie M., to submit her person to an examination by medical experts. Waiving all questions as to the informality of the application, we do not think there was any error in the ruling of the court in refusing to grant the application and make the order. We are not cited to any case where any court has held such an examination to be proper, and we think none can be found.

One should not publish and circulate slanderous charges against a young unmarried female, as proven in this case, unless he is able to substantiate them when called upon to do so, without calling upon the court to aid in the search for evidence in his behalf by ordering and subjecting her to an indelicate examination of her person, with the hope of obtaining some information advantageous to the defense, and calling to his aid the power of the court as a means of humiliating her still more. When one voluntarily asserts a slanderous charge against another, and defends by alleging the truth of his assertion, he must be able to substantiate the truth of the charge without invading the privacy of the person about whom the charge is made. The court very properly refused to make the order requiring the plaintiff to submit her person to an examination. Indeed, the court was exceedingly lenient with the defendant in this case, as the verdict was for \$8,000, and it required the plaintiff to remit the amount in excess of \$2,000, and only rendered judgment for the latter amount, which was a liberal exercise of authority in the defendant's behalf.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs and five per cent. damages.  
Filed June 4, 1889.

No. 13,645.

## LITTLETON v. SMITH ET AL.

**JUDGMENT.**—*Injunction.*—*Special Judge.*—*Irregular Appointment.*—*Collateral Attack.*—A party can not have the collection of a judgment enjoined, as being void, by alleging matter *dehors* the record, showing that the special judge who presided at the trial of the cause was not regularly appointed; it is only where the record affirmatively shows the presiding judge's want of authority that a collateral attack will lie.

From the Clinton Circuit Court.

*S. O. Bayless, J. V. Kent and J. W. Merritt*, for appellant.  
*M. Bristow and M. B. Beard*, for appellees.

MITCHELL, J.—This was a proceeding by Littleton against George A. and Mark C. Smith, and John A. Petty, the latter being the sheriff of Clinton county, to enjoin the collection of a judgment recovered by the Smiths against Littleton in the Clinton Circuit Court.

The plaintiff's case proceeds upon the assumption that the judgment, the collection of which is sought to be enjoined, is absolutely void, and that it may be so treated in this collateral proceeding.

It appears from the complaint that the original action was commenced in the Clinton Circuit Court, and that, upon due application, the venue was afterwards changed to the Tippecanoe Superior Court. The cause was afterwards returned to the Clinton Circuit Court, whereupon Perry W. Gard, Esq., a competent attorney and member of the bar of the latter court, was, by the mutual agreement of the parties, chosen and appointed as special judge to try the cause. The trial proceeded, without objection, before the special judge so appointed, the result being a judgment against the appellant. It is now insisted that the judgment so given and rendered was, and is, absolutely void because the special

119	230
119	537
121	166
119	230
130	21
119	230
134	379

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Littleton v. Smith *et al.*

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judge was not appointed in writing, and for the further reason that he did not take and subscribe the oath which the statute requires to be administered to special judges. Moreover, it is claimed that the judgment is void for the further reason that the transcript had not been returned from the Tippecanoe Superior Court until after the judgment in question had been rendered. This is an attempt to impeach and invalidate a judgment rendered by a court of general jurisdiction by alleging matter *dehors* the record. It is, therefore, a collateral attack, and can not succeed.

Where the record of a court of general jurisdiction, either affirmatively or by the presumptions which attach to it, shows that a judgment has been rendered against a party over whom the court had acquired jurisdiction, any attack, the sole purpose of which is to have the judgment declared void by proving matter *dehors* the record, is a collateral attack, and can not be made by a party to the judgment. *Harman v. Moore*, 112 Ind. 221.

The appointment of special judges is authorized and provided for by the statute. The complaint shows that a special judge was appointed, by mutual agreement, in the original case, and that the trial proceeded to judgment before him without objection, either in respect to the regularity of the appointment, the qualification of the judge, or that the transcript had not been returned from the Tippecanoe Superior Court. These objections are not now available in this collateral proceeding.

One who desires to assail the authority, or the regularity of the appointment, of a special judge who was competent and might properly have been appointed, must do so in the original proceeding. After judgment has been rendered, unless the record affirmatively discloses the want of authority of the presiding judge, his appointment can not be successfully assailed. *Schlunger v. State*, 113 Ind. 295, and cases cited; *Board, etc., v. Courtney*, 105 Ind. 311; *Reid v. Mitchell*, 93 Ind. 469; *Rubush v. State*, 112 Ind. 107;

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Tufts, Trustee, v. The State, *ex rel.* Smith *et al.*

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*State, ex rel., v. Murdock*, 86 Ind. 124; *Powell v. Powell*, 104 Ind. 18, 29.

Where there is no written appointment shown by the record, and objection is seasonably made in the court below, a reversal may follow on appeal.

The judgment is affirmed, with costs.

Filed June 5, 1889.

119	232
120	104
119	232
149	254
150	232
119	232
163	247

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No. 13,611.

TUFTS, TRUSTEE, v. THE STATE, EX REL. SMITH ET AL.

**TOWNSHIP TRUSTEE.**—*Discontinuance of School.*—*Discretion.*—*Mandamus.*—

Where a township trustee, acting in good faith and in the exercise of his discretion, discontinues a school previously maintained in a school-house owned by the township, on account of the smallness of the attendance, his decision will not be reviewed by the courts, and mandamus will not lie to compel him to re-establish the school.

**SAME.**—*Omission to Enter Order of Discontinuance of Record.*—The trustee having reached a decision and given notice thereof, a mere omission to enter his order of discontinuance of record at the time it was made is not a material matter.

From the Dearborn Circuit Court.

*H. D. McMullen* and *W. A. Greer*, for appellant.

*J. K. Thompson*, for appellees.

**ELLIOTT, C. J.**—The relators applied for and obtained a writ of mandate, directed against the appellant as a school trustee of Washington township, Dearborn county. They allege in their petition that they are voters of the township, and taxpayers for school and other purposes; that each of

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Tufts, Trustee, v. The State, *ex rel.* Smith *et al.*

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them is the head of a family, and has children entitled to attend school in school-house No. 2 of the township; that school has been regularly taught in that school-house for more than fifteen years; that the defendant, as school trustee, has money in his hands belonging to the tuition fund of the township; that it was his duty to employ a teacher for school No. 2; that he has refused to perform that duty; that there are four schools in the township, all of which have been regularly conducted for more than fifteen years, and that the building and furniture for school No. 2 is owned by the township for school purposes.

The allegations of the amended return of the appellant may be thus summarized: That the appellant, as school trustee, believing it to be for the best interest of the school township, did, on the 15th day of June, 1886, abolish school No. 2, and directed that the pupils theretofore enumerated for and allotted to that school be allowed to attend any of the other schools in the township that their parents or guardians might select; that he notified the relators, and all others having children entitled to attend school No. 2, of his action abolishing the school, and offered to make the proper transfer to such schools of the township as they might designate, without any expense for tuition; that all of the relators, except Robert A. Smith, refused to designate the school they desired pupils to attend; that in school-houses Nos. 1, 3 and 4 there are good schools, taught by competent teachers, and good and sufficient school accommodations; that the average attendance at school No. 1, from the beginning, has been only twenty-four; that the average attendance at school No. 3 has been only eighteen, and at school No. 4 only sixteen pupils; that there has been in force in Dearborn county, for more than two years, a rule adopted by the county board of education, reading thus: "Whenever the attendance at any school shall be reduced to six persons, for five successive days, such school shall be discontinued; provided such reduced attendance is not caused by sickness,

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or other causes providential;" that during the last two months of the last term of school No. 2 the daily average attendance was only four pupils, and during the last four weeks of the term the average daily attendance was not three pupils, and that the reduced attendance was "not caused by sickness, or other causes providential;" that there are no children desirous of attending school No. 2, other than those referred to in the petition of the relators."

There are other allegations in the return, but we do not deem it necessary to refer to them.

We regard the return as sufficient, and hold that the trial court erred in declaring it bad. It shows that the trustee did not arbitrarily and unreasonably exercise the authority vested in him in discontinuing school No. 2, and the courts can not review the action taken by him. It is a general rule that courts will not revise the exercise of discretionary authority by a public officer, for, as long as he acts in good faith and within the general scope of his authority, he is not subject to judicial control. *Weaver v. Templin*, 113 Ind. 298; *Leeds v. City of Richmond*, 102 Ind. 372; *City of Kokomo v. Mahan*, 100 Ind. 242; *Mayor v. Roberts*, 34 Ind. 471.

The fact that the school township owns the school-house, and furniture does not, of itself, compel the trustee to cause school to be kept in it. The trustee may, for good cause, discontinue a school; and he may, therefore, do so when the attendance has become so small as to satisfy him that no good purpose can be accomplished by keeping the school open. Our decisions upon this subject go much farther than we are required to do in this instance, and we can not, without overruling them (and this we have no disposition to do), uphold the ruling of the court below. *Koontz v. State, ex rel.*, 44 Ind. 323; *State, ex rel., v. Mewhinney*, 67 Ind. 397; *State, ex rel., v. Sherman*, 90 Ind. 123.

The power of determining when a school shall be discontinued must necessarily be lodged in some officer, and his decision must be final, unless bad faith is shown. If this

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 Griffin, Administrator, v. Hodshire.
 

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be not true, then a school once established can not be discontinued, although no more than one pupil attends. The law never contemplated such a result.

We do not regard the omission of the trustee to enter his order of record at the time it was made as materially affecting the question. If he reached a decision and gave notice, he can not be compelled to reverse that decision, although he may not have entered his order of record at the proper time.

Judgment reversed.

Filed June 5, 1889.

119	285
121	488
119	285
127	75
119	235
148	229

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No. 13,885.

### GRIFFIN, ADMINISTRATOR, v. HODSHIRE.

**DECEDENTS' ESTATES.**—*Claim Against.*—*General Denial.*—*Defences Admissible Under.*—Where a general denial is filed to a claim against an estate, all matters of defence, except set-off and counter-claim, may be given in evidence thereunder.

**MORTGAGE.**—*Foreclosure.*—*Parties.*—*Assignee in Bankruptcy.*—*Void Sale.*—*Satisfaction of Judgment.*—Where a mortgagor becomes bankrupt and conveys his property, including that described in the mortgage, to an assignee, the latter is a necessary party to a suit to foreclose the mortgage, and a sale under a decree given in a suit to which he is not a party is void, does not satisfy the judgment, and is not a bar to an action thereon.

**JUDGMENT.**—*Res Judicata.*—*Estoppel.*—Where a judgment debtor institutes an action to have the judgment declared satisfied, it is his duty to bring forward any matter, then existing, which will entitle him to the relief sought, and all matters which he might have adduced in that proceeding, but omitted, are barred by the judgment then rendered, and can not

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Griffin, Administrator, v. Hodshire.

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be litigated in an action against his representatives upon the original judgment.

From the Montgomery Circuit Court.

*B. Crane* and *A. B. Anderson*, for appellant.

*T. H. Ristine*, *H. H. Ristine*, *P. S. Kennedy* and *S. C. Kennedy*, for appellee.

COFFEY, J.—The appellee filed the following claim, in the Montgomery Circuit Court, against the estate of James Wasson, deceased, viz.: “The estate of James Wasson, deceased, to Martha F. Hodshire, Dr: To amount of judgment in her favor, and against said defendant and John Wasson, rendered in the Montgomery Circuit Court on the 20th day of May, 1876, entered in Order Book 19, page 85, and in Judgment Docket 7, at page 85, \$1,484.70, and interest on the same to this date, February 18, 1887, \$958.82, \$2,443.52.”

Upon an issue formed by the general denial the cause was tried by the court, who made a special finding of the facts and stated conclusions of law thereon as follows:

“1. That on the 20th day of May, 1876, the plaintiff, Martha F. Hodshire, recovered a judgment and a decree of foreclosure, in the Montgomery Circuit Court, of Indiana, \* \* against the deceased, James Wasson, and another, for the sum of \$1,484.70, and that there is due and unpaid, at this time, for the principal and interest thereof, the sum of twenty-four hundred and seventy-two dollars (\$2,472).

“2. That a certified copy of the decree and judgment rendered in said case of Hodshire v. Wasson *et al.*, on said 20th day of May, 1876, issued to the sheriff of Montgomery county, Indiana; that the only endorsement or return ever made by said sheriff upon said certified copy of said decree and judgment was in the words following:

“‘April 21st, 1877. Received of Martha F. Hodshire the sum of sixteen hundred and twenty and 25-100 dollars, in full of her bid and purchase money on the within described real estate.

SAMUEL D. SMITH, Sheriff M. C.’



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“ ‘April 21st, 1877. Received of S. D. Smith, sheriff, the sum of fifteen hundred and sixty 60-100 dollars in full of the principal and interest due plaintiff as realized on sale of the within described real estate.

“ ‘MRS. M. F. HODSHIRE, per H. WASSON.’

“3. That Samuel D. Smith, as sheriff of Montgomery county, Indiana, on the 21st day of April, 1877, offered for sale at public auction the real estate described in said decree, to satisfy the judgment in favor of Martha F. Hodshire v. James Wasson *et al.*, rendered May 20th, 1876, and that at such sale there was bid for said land, on behalf of said Hodshire, the amount due for principal, interest and costs upon said judgment, to wit: \$1,620.70, and that said Smith, sheriff, did, on said 21st day of April, 1877, as such sheriff, sell said real estate to said Martha F. Hodshire.

“4. That at some time thereafter, Henry Wasson paid to said sheriff the sum of \$54.00, costs, and that he paid the said sum as the agent of said Martha F. Hodshire.

“5. That on the 7th day of January, 1884, the said James Wasson instituted a suit against said Martha F. Hodshire, being cause No. 6,984, in the Montgomery Circuit Court, to have declared satisfied the judgment rendered in favor of said Hodshire against said Wasson on May 20th, 1876, as hereinbefore found; that in said suit there was a special finding of facts and conclusions of law stated thereon, and in pursuance thereof it was adjudged that plaintiff take nothing by his suit, and judgment was rendered in favor of said Hodshire for costs; that said Wasson appealed therefrom to the Supreme Court of Indiana, and the judgment rendered as aforesaid was, in said Supreme Court, affirmed; that the complaint, answer and order book entries, special finding of facts and conclusions of law, and judgment in said cause No. 6,984, are as follows: \* \* \* ‘James Wasson, plaintiff, complains of Martha Hodshire, and says, that on the 7th day of May, 1872, the plaintiff and John Wasson were the joint owners of the following described real estate in Mont-

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gomery county, Indiana, to wit: The southwest quarter of section thirty-four (34), township twenty (20) north, of range four (4) west, containing 160 acres, more or less; that on the said 7th day of May, 1872, the plaintiff and said John Wasson borrowed of the defendant the sum of \$2,250, and executed to the defendant their note therefor, and to secure the payment of the note executed to the defendant a mortgage on said described real estate; that one-half of the said sum of \$2,250 was received by and was for the use and benefit of said John Wasson; that, as to the share of said \$2,250 received by said John Wasson, plaintiff was surety only for said John, as the defendant well knew, at the time said money was lent and said note and mortgage executed; that on the 7th day of April, 1875, the said James Wasson, by himself or an authorized agent, paid the one-half of the amount then due on said note, the whole note being then due and payable, and the said defendant, by entry of record, released all the interest of the plaintiff in and to the real estate described in said mortgage from the lien of said mortgage, and plaintiff's interest in said mortgaged premises was one-half in value thereof; that on the 13th day of April, 1876, said defendant commenced a suit, in the Montgomery Circuit Court, against said plaintiff and said John Wasson, on said note for the balance due thereon, and for the foreclosure of said mortgage; that such proceedings were had in said suit as resulted, on the 20th day of May, 1876, in a judgment against said plaintiff and said John Wasson for the balance due on said note, to wit, \$1,409.40, and the further sum of \$75.00 as attorney's fees, and the foreclosure of said mortgage as to the interest of John Wasson in said real estate at the time the mortgage was executed, said interest being the undivided one-half of said real estate; that in and by said decree it was ordered that said undivided half of said real estate be sold to satisfy said judgment, and in default of said real estate bringing sufficient to satisfy said judgment, that the balance be made by levy and sale of the property

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of said defendants; that on the 3d day of November, 1876, a copy of said judgment and decree was duly certified to the sheriff of said county, who proceeded by virtue thereof to advertise said real estate for sale, and on the — day of —, 1876, in pursuance of said advertisement, offered said real estate for sale at the court-house door in said county, and the plaintiff, by herself and agent, bid for said real estate an amount sufficient to satisfy said judgment, interest and costs, and accrued costs, and the said bid was accepted, it being the highest and best bid made; that said defendant failed and refused to pay the costs included in said proceedings and to complete the purchase of said real estate; that she suffered said real estate to become delinquent for taxes, and that afterwards said real estate was sold to satisfy said delinquent taxes, to Hector S. Braden, who received a deed by virtue of said sale, and acquired the title thereby to said real estate; and plaintiff further avers that said real estate was, at the time of the rendition of said judgment, and at the time it was offered for sale as aforesaid, more than sufficient in value to pay said judgment and costs, and accruing costs; wherefore,' etc., \* \* \*. That said Martha F. Hodshire answered said complaint by a general denial.

“That the special finding in said cause was as follows:

“‘1. That on the 7th day of May, 1872, the plaintiff and John Wasson were the joint owners of the following described real estate, in Montgomery county, to wit: The southwest quarter of section thirty-four (34), township twenty (20) north, range four (4) west.

“‘2. That on said 7th day of May, 1872, the plaintiff and the said John Wasson borrowed of the defendant the sum of \$2,250, and executed to her their note therefor and a mortgage upon said land to secure the same.

“‘3. That one-half said sum of \$2,250 was received by said John Wasson, and was for his use, and the other half was received by the plaintiff herein.

“‘4. That as to the one-half of said sum received by the said

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John Wasson the plaintiff was surety only, which fact became known to the defendant on the 20th day of May, 1876.

“5. That on the 7th day of April, 1876, the plaintiff paid to the defendant his one-half of said sum, with the interest thereon to that date.

“6. That on said 7th day of April, 1875, the defendant released all the interest of the plaintiff in and to the real estate described in said mortgage from the lien of said mortgage, being one-half thereof.

“7. That on the 13th day of April, 1876, said defendant commenced suit in the Montgomery Circuit Court against the plaintiff and said John Wasson, on said note, for the balance due thereon and for the foreclosure of said mortgage; that such proceedings were had in said suit as resulted, on the 20th day of May, 1876, in a judgment against the plaintiff and said John Wasson for the sum of \$1,409.40, and the further sum of \$75 as attorney's fees, and the foreclosure of said mortgage as to the interest of said John Wasson in said real estate at the time said mortgage was executed, being the undivided one-half thereof.

“8. That on the 3d day of November, 1876, a copy of said judgment and decree was duly certified to the sheriff of said county of Montgomery, who proceeded by virtue thereof to advertise said real estate for sale on the 24th day of April, 1877.

“9. That at the time of said foreclosure proceeding John Wasson had become and was a bankrupt, and M. D. Manson was assignee in bankruptcy of said Wasson's estate, and succeeded to all the rights of John Wasson in said real estate.

“10. That at the February term, 1879, of the Montgomery Circuit Court, in a proceeding for partition of said real estate between the plaintiff and said Manson and said John Wasson, the share of said real estate to which said John Wasson would have been entitled, had he not become a bankrupt, was set off to the assignee, the said Manson, and the said plaintiff's interest in said real estate was set off to him.

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“ ‘ 11. That the interest in said real estate which was set off to said Manson was subject to the lien of defendant’s mortgage; that said interest was suffered to and did become delinquent for unpaid taxes, and, on the 14th day of February, 1879, was sold at tax sale to Hector S. Braden.

“ ‘ 12. That afterwards, to wit, on the 14th day of February, 1881, said Hector S. Braden, having acquired a tax deed in pursuance of his said purchase, commenced an action in the Montgomery Circuit Court against the defendant herein and others to quiet his title to said real estate acquired by said tax sale and deed, and obtained a judgment quieting his said title against said defendant; that said defendant failed to appear to said action, and suffered judgment by default to go against her in said action, and was thereby deprived of the benefit of said land as a security for his said debt.

“ ‘ And the court finds and states as its conclusions of law, based on the above found facts :

“ ‘ 1. That as the loss of the mortgage security was occasioned by no affirmative act on the part of the defendant, Hodshire, but was merely suffered by her to be sold for the payment of delinquent taxes thereon, she is not guilty of such negligence in respect to the loss of said mortgage security as will discharge and release the plaintiff as surety on said mortgage debt.

“ ‘ 2. That the defendant is entitled to a finding in her favor.

“ ‘ It is, therefore, considered and adjudged by the court that plaintiff have nothing by his suit, and that the defendant have and recover of and from the plaintiff her costs herein, taxed at \$——.’

“ 6. That the suit begun as aforesaid, on January 7th, 1884, by said James Wasson against said Martha F. Hodshire, involved the same matters and the same issues, and was between the same parties as in this suit, and that the matters sought to be litigated by the defendant in this suit were liti-

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gated and determined in said former suit in favor of said Martha F. Hodshire."

As conclusions of law upon the foregoing facts the court states :

" That there is now due the plaintiff, Martha F. Hodshire, on her said judgment, the sum of \$2,472, and the court finds for the plaintiff for said sum of \$2,472."

And the defendant excepted to said conclusions of law.

Judgment was rendered in favor of the appellee on the above finding for the sum therein stated, and the appellant assigns as error that the circuit court erred in its conclusions of law as above set forth.

The only pleadings in the cause consist of the claim in suit and the denial thereto. Under such an issue all matters of defence, except set-off and counter-claim, might be given in evidence. Section 2324, R. S. 1881.

As the evidence in the cause is not in the record, it is difficult to determine, with exactness, just what the appellant did rely upon as a defence in the circuit court. It was found by the court that the matters involved in this suit are the same as the matters involved in the case of *Wasson v. Hodshire*, 108 Ind. 26, and that they were adjudicated and settled in that suit. If so, then the first conclusion of law stated by the court is correct. But, conceding that the matter relied upon by the appellant was that the judgment in the case of *Hodshire v. Wasson et al.* had been satisfied by the sale of the mortgaged property in that judgment and decree described, we think that the second statement of the law is correct.

It appears by the special findings that at the time of the foreclosure proceeding therein set out, John Wasson had become a bankrupt, and that his interest in the land described in the mortgage had been assigned to Manson. It does not appear that Manson was made a party to the suit to foreclose the mortgage. If he held the title, and was not a party to

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that suit, the foreclosure was void, and a sale under it conveyed no title. It did not satisfy the judgment, and was no bar to an action upon such judgment. *Curtis v. Gooding*, 99 Ind. 45; *Pauley v. Cauthorn*, 101 Ind. 91; *Shirk v. Andrews*, 92 Ind. 509; *Searle v. Whipperman*, 79 Ind. 424.

It furthermore appears from the allegations in the complaint in the case of *Wasson v. Hodshire, supra*, that the appellee in this case never perfected her bid on the sale of the land in the foreclosure proceedings, and it was determined in that action that the plaintiff was not entitled to be relieved from the judgment then standing against him. His representative can not now be heard to say that such judgment was not binding upon him. A party can not be permitted to split up his cause of action and maintain separate suits upon it, and thus harass his antagonists. *Freeman Judgments* (3d ed.), section 309; *Indiana, etc., R. W. Co. v. Koons*, 105 Ind. 507.

In the case last above cited this court approved the following quotation from the case of *Henderson v. Henderson*, 3 Hare Ch. 100 (115): "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

The object of the suit of *Wasson v. Hodshire, supra*, was to have the judgment then in controversy declared satisfied as to Wasson. It was his duty in that suit to bring forward any matter that then existed which would enable him to succeed in the accomplishment of the object sought. All matters at that time omitted are precluded by the judgment then rendered.

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In our opinion the court did not err in its conclusions of law in this case.

Judgment affirmed.

Filed June 4, 1889.

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**LIBEL.**—*Mitigation of Damages.*—*Pleading.*—Evidence in mitigation of damages is admissible under an answer of general denial.

**SAME.**—*Officer of Insurance Society.*—*Charge of Fraud and Embezzlement.*—*Justification.*—*Evidence.*—In an action for libel wherein it is alleged that the defendants, the publishers of a newspaper, charged the managers of an insurance company, of whom the plaintiff was one, with fraudulently conducting the concern and with embezzling the funds of the society, evidence of the business methods and practices of the society are competent evidence under a plea of justification.

**SAME.**—*Motive of Publisher.*—*Malice.*—If the defendants, in publishing the article complained of, acted from an honest motive to protect the public against impostors, or upon information tending to show that the plaintiff was engaged in a corrupt scheme to obtain and appropriate money for his own profit, this fact would rebut malice and reduce the damages.

**SAME.**—*Grounds for Inferring Truth of Publication.*—*Evidence.*—Circulars issued by the officers of the society, which contained false statements and furnished grounds for inferring that they were made to enable the plaintiff and his associates to secure and appropriate money belonging to the society, were admissible on behalf of the defendants, either in mitigation of damages or in justification of the publication.

**SAME.**—*Question for Jury.*—It being shown that considerable sums of money belonging to the society were falsely accounted for in statements sent out by its officers, it was for the jury to determine, from the position of the plaintiff as the president of the society, the active part he took in its affairs, and other facts, whether or not he fraudulently appropriated the money.



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**SAME.—Entire Article to be Considered.—Examination of Witnesses.**—As an aid to the discovery and exhibition of the motive which influenced the author in writing and publishing an alleged libellous article, it is proper to refer, in the examination of witnesses, to all that was written, and it is also the duty of the court to consider the whole of the publication.

**SAME.—Non-Libellous Charge.—Intent of Author.**—If a publication does not contain a libellous charge, then, no matter what the author intended, no action will lie.

**SAME.—Meaning of Article.—When to be Determined by the Court and When by the Jury.**—Where the article is plainly unambiguous, the question of its meaning and character is for the court, but where a portion of an article is selected and declared on, and its meaning is ambiguous, then the question is for the jury.

**EXAMINATION OF PARTY.—Cross-Examination.—Competency of.**—A party who is examined as a witness at the instance of the adverse party, prior to the trial, under section 509, R. S. 1881, may also be cross-examined, and the cross-examination is competent evidence in his behalf.

**ARGUMENT OF COUNSEL.—Misconduct.**—An error of counsel in argument in stating a wrong conclusion, or drawing a mistaken inference from the evidence, does not constitute misconduct.

**INSTRUCTIONS TO JURY.—Refusal to Give.**—It is not error to refuse to give instructions asked, unless they are in terms correct.

From the LaPorte Circuit Court.

*J. M. Vanfleet*, for appellant.

*A. Anderson, M. H. Weir and D. J. Wile*, for appellees.

**ELLIOTT, C. J.**—The appellant's complaint, as it was originally framed, charged that the appellees had published a malicious libel, intending to injure the appellant, and "to hold him up to public scorn, contempt and ridicule." The entire article was set out, and the complaint, as it was first framed, seemed to charge that the whole article was false and libellous. At a subsequent point in the proceedings, the appellant withdrew from his complaint all specifications of the falsity of the charges contained in the article, except one. The record thus exhibits the withdrawal: "Said plaintiff also now dismisses and withdraws from the several paragraphs of the complaint each and every charge of libel against said defendants except that part of the article published, and

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the words of the said paragraph of the complaint charging, that the plaintiff fraudulently appropriated the money and funds of said society to his own use, as in said paragraph set forth and alleged, hereby intending and confining the charge to said specific accusation.” In order to understand the questions presented, it is necessary to set forth almost in full the article which the appellant charges was libellous. It reads thus :

“Though the ‘ Old Peoples’ Mutual Benefit Society,’ of Elkhart, may have ‘ glib talkers’ in the field to take in the unwary, it is difficult to comprehend why any person of good sense can fail to discern the self-evident fraudulent character of this institution. The entire *modus operandi* upon which its business is conducted is suggestive of the snide performance. The ‘ O. P.’ is nothing more and nothing less than an enterprise for putting money into the pockets of its managers.

“ We have before us a little pamphlet issued by the ‘ O. P.’ in 1884, containing the first annual report of that organization. On page 7 will be found the ‘ List of Losses Paid.’ Below is a list of nine persons to whom losses were paid during the period named, all of them being residents of the State of Michigan. We give names and residence, the amount alleged and advertised to have been paid, and directly opposite the amount actually paid :

	Amount Claimed Paid.	Amount Actually Paid.
Perry Wells, Charlotte.....	\$1,250	\$900
Alex. Adams, Homer.....	250	200
Wm. B. Walz, Marshall.....	750	600
Olive Hogle, Partelle.....	750	525
L. J. Smith, Charlotte.....	1,500	918
H. A. Lewis, Homer.....	1,000	125
F. B. Walworth, Reading.....	2,000	1,200
A. E. Bartholomew, Reading.....	500	450
F. G. Reynolds, Battle Creek.....	1,500	850
	<u>\$9,500</u>	<u>\$5,768</u>

“ The table from which the above names are copied con-

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tains the names of sixteen persons to whom losses were paid. Of these sixteen persons we have the exact amounts actually paid to nine thereof. Messrs. Mosier and Lumbert advertise to the world that they paid these nine persons the aggregate sum of \$9,500, when, in point of fact, these parties received but \$5,768, a difference of \$3,732.

“ Now, to whom did this snug little sum of \$3,732 go ? To the managers of the ‘ O. P. ’ How do they manage this little snide operation ? In this manner : The death of an insured person is reported to the company. Notices of assessment are sent out to the policy-holders. The assessment blanks are sent to the agents, or collectors, in the different localities in which the policy-holders reside. As these assessments are paid the amount is credited on the agent’s blanks, who subsequently makes his return to the company at Elkhart. Now, instead of entering up on the books of the company all of the assessments paid, the ingenious and benevolent Mr. Lumbert makes a calculation just how much he ought to pay on such and such a loss, and then enters on the books just enough assessment returns to aggregate the amount he feels disposed to pay over to the insurer. The concern is so managed as to afford a fair pretext for delay. The insurer makes regular inquiries of the agent, and the expected answer failing to materialize, he finally concludes to make a journey and personally interview the philanthropic Lumbert. This good Samaritan invites the hopeful and eager insurer to figure up the amount credited on the books in favor of this particular policy. Let us take the case of Mr. Reynolds. His policy called for \$1,500. Mr. Lumbert says, in his bland manner : ‘ \$850 is all that has been realized on this policy ; you have paid in only so and so much ; you make a good thing out of this ; you ought to be satisfied with such a handsome return. ’ The insinuating manner of Mr. Lumbert, and the overwhelming logic of Hon. Cyrus F. Mosier rarely fail to have the desired effect ; the insurer receives a check for the amount agreed upon, signs a receipt for the

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full amount of the policy, surrenders the latter, and goes on his way rejoicing. Lumbert and Mosier then chuckle over the net profit made on this policy, and gleefully figure up the proportion of their individual swag. They next utilize the receipt of their latest victim to pull the wool over the eyes of gullible people in localities where their mode of doing business is not understood. A little later on the omitted assessment payments are also entered on the books, so that the record may be made complete for official inspection.

“Occasionally some fellow will become obstreperous, and threaten to ‘blow up the concern.’ If he chances to be a bright, smart sort of a fellow, with plenty of grit in his make-up, Lumbert and ‘the other boys’ will conclude that discretion is the better part of valor and come down with their ducats. But these cases are comparatively rare. Under the law no insurance can be drawn unless the would-be beneficiary has an insurable interest in the person insured. A goodly number of the policies issued by the ‘O. P.’ are of an unlawful character, the insurer either having no insurable interest in the person insured, or the insured person not knowing anything about a policy having been taken out on his or her life. In cases of this kind Lumbert & Co. hold a good hand. They can threaten to have the insurer arrested for forging the name of the insured person, and thus scare the insurer into the acceptance of whatever sum the ‘O. P.’ managers may set apart for the particular case.”

It seems quite clear to us that this withdrawal completely deprived the complaint of validity, for we find no charge in the article that “the plaintiff fraudulently appropriated the money to his own use.” The charge is that the sum of \$3,732 went to the managers of the society. The parts of the article directly bearing upon the point under immediate mention are these: “Now, to whom did this snug little sum of \$3,732 go? To the managers of the O. P.” “Lumbert and Mosier then chuckle over the net profits made on the policy, and gleefully figure up the proportion of their individual

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swag." These statements, when taken in connection with the other statements of the article, do not charge the appellant with fraudulently appropriating the money of the society, but with fraudulently obtaining money for the society and getting their share of it as members or managers. If we are right in this conclusion, then, as there was no cause of action, there was nothing upon which a verdict could be founded. But, waiving a decision of this point, we proceed to examine the other questions presented by counsel.

We have no doubt that the court did right in admitting evidence of the business methods and practices of the society, for, conceding that there is a sufficient complaint, the defendants, under their justification, had a right to get all the facts before the jury. If the manner of doing business was such as to enable the managers to obtain money and divide profits as charged, then the defendants had a right to evidence of that fact, for it tended to show that the charge was true. If, however, as appellant argues, the charge in the article is that he was guilty of embezzling the funds of the society, the evidence was competent, for it was necessary for the jury to have all the facts in order to determine whether the charge was true or false. It would not excuse the appellant if other agents or officers united with him in fraudulently appropriating the money of the society of which he was the president, for if the money belonging to the society was fraudulently appropriated, the appellant was guilty as charged, although he secured the money as one of the managers of the society. It was not necessary to prove by direct evidence that the appellant knew of the corrupt methods adopted, as that might be established by inference.

The general denial was one of the answers, and, under this plea, the defendants had a right to give evidence in mitigation of damages, and the appellant's counsel is, therefore, in error in assuming that the only evidence the defendants were entitled to give was such as sustained the pleas of justification. *O'Conner v. O'Conner*, 27 Ind. 69; *Waugh v.*

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*Waugh*, 47 Ind. 580. Circulars issued by the officers of the society, even if they did not tend to prove matters in justification, might tend to mitigate damages, for, if the defendants, in publishing the article in their newspaper, acted from an honest motive to protect the public against impostors, or upon information tending to show that the plaintiff was engaged in a corrupt scheme to obtain and appropriate money for his own profit, this fact would rebut malice, and thus reduce the damages. *Odgers Libel and Slander*, 301; *Smith v. Scott*, 2 Car. & Kir. 580; *Davis v. Cutbush*, 1 F. & F. 487; *Duncombe v. Daniell*, 8 C. & P. 222; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Heilman v. Shanklin*, 60 Ind. 424.

The circulars were, however, admissible under the pleas of justification, for they tended to prove that the plaintiff fraudulently received and appropriated money. They showed that considerable sums of money were falsely accounted for, thus supplying grounds for the inference that there was a fraudulent appropriation of money. It was for the jury to determine, from the position of the appellant as the president of the society, the active part he took in all of its affairs, and the other facts, whether he did or not fraudulently appropriate, as profits, money that ought to have gone to the payment of members of the society holding policies. The circulars did much more than "puff" the business of the society; they contained false statements, which furnished grounds for the inference that they were made for the purpose of enabling the appellant and his associates to secure and appropriate money belonging to the society.

John B. Stoll, one of the appellees, was examined prior to the trial, under the provisions of section 509, R. S. 1881. The appellant, himself, introduced in evidence the direct examination of Mr. Stoll, and the appellees introduced the cross-examination. The appellant contends that the court erred in ruling the cross-examination competent. The appellant is in error; the section of the code relied on provides that the "party may be examined as a witness," and this

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clearly implies that the usual course, embracing a direct examination and a cross-examination, may be pursued. *Hope v. Balen*, 58 N. Y. 380.

It was proper to refer to the entire article, and for that purpose it was competent to ascertain the intention with which it was written and published. *Odgers Libel and Slander*, 302. The motive which influenced the author was an important element, and, as an aid to its discovery and exhibition, it was proper to refer in the examination of witnesses to all that was written ; and it was also the duty of the court and jury to consider the whole of the publication. But if we are wrong in the view we have taken, still the result will not be changed, for the appellant, himself, opened the way to the introduction of the testimony, and he is not in a situation to successfully complain that cross-examining counsel kept in it. *Gaff v. Greer*, 88 Ind. 122 ; *Lowe v. Ryan*, 94 Ind. 450 ; *Hinton v. Whittaker*, 101 Ind. 344 ; *Dinwiddie v. State*, 103 Ind. 101.

Complaint is made of the conduct of the appellees' counsel, in making the opening statement. The record thus exhibits the conduct of counsel, and the objection of the appellant :

“ The counsel for the defence, in his opening statement, said, among other things, that the libellous article should be taken as a whole, and stated to the jury the contents of the article ; that in the article the defendants charge the plaintiff and his associates with owning and operating a fraudulent insurance company, and with swindling the insured ; but that plaintiff did not sue for that, but only sued for so much of the article as charged embezzlement or misappropriation of money, virtually admitting that the article in the main was correct, but claiming that the managers of the company had honestly divided among themselves the money which they had obtained by fraud.

“ Mr. Anderson said that in the article mentioned defendants charged plaintiff and his associates with swindling ; that

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they insulted plaintiff; that they spat in his face; that plaintiff did not resent the insult; he did not sue for that; but he brought the action only for so much of the article as charged plaintiff and his associates with making an unfair division of the spoils.

“Mr. Vanfleet then arose and objected to the last remark. Mr. Anderson then expressed his willingness to withdraw the remark if it wounded the feelings of plaintiff.

“Nothing more occurred in this connection; to all of which the plaintiff’s counsel objected at the time, and requested the court to prohibit him from using such language, which the court refused to do, to which ruling of the court the plaintiff, by his counsel, then excepted.”

We do not think there was such a material wrong, if, indeed, there was any wrong at all, as justifies a reversal. If the appellees’ counsel was in error in stating what the appellant virtually admitted, his mistake was in drawing a wrong inference, or in stating an erroneous conclusion, and such mistakes do not constitute misconduct. *Proctor v. DeCamp*, 83 Ind. 559; *Brower v. Goodyer*, 88 Ind. 572. There was no misstatement of a fact, so, conceding that appellant’s counsel is right in asserting that all that was not denied was not admitted, there was nothing more than an error in stating the speaker’s judgment, inference, or conclusion.

The instructions of the court are models of perspicuity, strength and accuracy. They gave the law to the jury with unusual force and precision. The criticisms of counsel are without foundation.

It is not error to refuse instructions, unless they are in terms correct. *Goodwin v. State*, 96 Ind. 550.

The fifth instruction asked by the appellant is not a just statement of the law, since it assumes that there was no controversy as to the nature of the charge published by the appellees, and asserts that if the defendants did intend to charge the plaintiff with embezzlement, he is entitled to recover, un-



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less the defendants have shown that he did appropriate the money. It is enough to say that this instruction was correctly refused, because the law is not, as it asserts, that if the author of an article intends to publish a libel, he does publish a libel; on the contrary, the law is that if the publication does not contain a libellous charge, then, no matter what its author intended, no action will lie. Odgers Libel and Slander, 93

If the complaint states a cause of action at all, it does so because the article published by the defendants charges the plaintiff with having fraudulently appropriated the money of the society to his own use. The article does not directly make such a charge, and we do not think that the court erred in refusing to instruct the jury that it does, on its face, contain such a charge. Where the article is plainly unambiguous, the question of its meaning and character is for the court; but where a portion of an article is selected and declared on, and its meaning is ambiguous, then the question is for the jury. *Gabe v. McGinnis*, 68 Ind. 538; *Over v. Schiffing*, 102 Ind. 191; *Donaghue v. Gaffy*, 54 Conn. 257; Townshend Slander and Libel, section 286.

The verdict is right, on the evidence.

Judgment affirmed.

Filed April 5, 1889; petition for a rehearing overruled June 4, 1889.

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Daugherty, Administrator, v. Rogers.

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No. 13,416.

## DAUGHERTY, ADMINISTRATOR, v. ROGERS.

**WILL.—*Interpretation.—Intention.***—Whatever method may be resorted to for the interpretation of a will, it must be applied solely with a view to arrive at the intention of the testator, as his intention may be gathered from the language found in the instrument itself.

**SAME.—*Latent Ambiguity.***—A latent ambiguity, which will justify the admission of evidence of extrinsic facts, is one which may arise, not upon the face of the will itself, but from facts therein referred to, which are extrinsic to the instrument.

**SAME.—*Evidence.—Extrinsic Facts.***—Whenever, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce a latent ambiguity, the court may inquire into every other material extrinsic fact or circumstance to which the will refers, and to the relation which the testator occupied to those facts, in order to arrive at a correct interpretation of the language actually employed.

**SAME.—*Presumption that Words are Used in Primary Sense.—When Contrary May be Shown.***—A testator is presumed to have used the words in which he expressed his intentions according to their strict and primary acceptance, and if, when applied to the extrinsic facts referred to, they are sensible, parol evidence is not admissible to show that they were used in some other sense; but it is otherwise if the words, in their strict and primary sense, are meaningless when applied to such extrinsic facts.

**SAME.—*Notes Executed by Legatee to Testator.—When Discharged.—Ambiguity.—Extrinsic Evidence.***—A testator bequeathed "to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars." At the time the will was executed the testator held six notes against Rogers, aggregating six thousand dollars. Upon his death they were found among his assets, and suit was brought thereon by his administrator against Rogers. The defendant answered that he had been reared in the family of the testator, who was a man of fortune, and who had often expressed an intention to make liberal provision for the defendant; that the testator had, prior to the execution of the will, advanced money to the defendant in anticipation of the testamentary provision which he intended to make for him, taking the notes in suit merely as memoranda of the amounts and dates; that no other money or property had ever been given to him by the testator; that the words "in addition to what I have already given him," employed in the will, had reference to the money represented by the notes, and that the will released and extinguished such notes.

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*Held*, that evidence to sustain the answer, including declarations made by the testator, was admissible, a latent ambiguity being developed by the extrinsic facts referred to in the will, and that, upon proof of the facts alleged, a judgment for the defendant was proper.

*Held*, also, that as the word "given," used in the will, if taken in its strict and primary sense, is meaningless when applied to the extrinsic facts referred to, it was competent to show that it was used in the secondary sense of "furnished" or "supplied."

BERKSHIRE, J., and OLDS, J., dissent.

From the Allen Superior Court.

*E. R. Wilson, J. J. Todd, J. Morris and J. M. Barrett*, for appellant.

*R. S. Taylor*, for appellee.

MITCHELL, J.—The last will and testament of Amos Curry, late of Wells county, deceased, was admitted to probate on the 23d day of September, 1885. Among other provisions, it contained the following :

"ITEM 10. I will, devise and bequeath to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars."

At the time the will was executed the testator held six notes against Philo Rogers, the legatee above named, calling for the payment of sums aggregating about six thousand dollars. These notes were found among the assets left by the testator at his death—the interest having been regularly paid—and the administrator, with the will annexed, instituted suit upon them, alleging that they were executed in consideration of money loaned to the defendant by the testator in his lifetime, and that they remained unpaid.

The defendant answered, in substance, that he had been taken into the testator's family and reared by him from tender infancy, substantially as a son, and that the relations between him and the testator were those of the closest intimacy and affection, and so continued until the death of the latter. It is averred that the testator was a man of fortune, his estate being of the value of \$80,000, and that his often-expressed

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intention was to make a liberal provision for the defendant out of his estate, in pursuance of which he had advanced to the latter, from time to time, divers sums of money in anticipation of the testamentary provision which he intended finally to make for him, taking notes for the sums so advanced, as memoranda of the amounts and dates of the advancements, which notes so taken were the identical ones mentioned in the complaint. It is averred further, that, at the date of the execution of the will, the testator had given him no other money or property except the several sums represented by the notes in suit, and that the words "in addition to what I have already given him," employed by the testator in the tenth item of his will, above set out, had reference to the money represented by the notes mentioned in the complaint, and that the will operated, and was intended to operate, as a release and extinguishment of the notes.

Issues were formed by a reply, and the case was tried and a judgment rendered for the defendant upon proof tending to support the theory foreshadowed by the answers.

Various incidental questions are presented, but the decision of the case upon its merits depends upon whether or not the court ruled correctly in admitting evidence to sustain the answers.

The will of Amos Curry was admitted in evidence, as was also extrinsic testimony tending to show that the testator had never, prior to the execution of the will, or since, given the defendant any money or other property except the money represented by the notes in question. Numerous declarations made by the testator, tending to show that he entertained a high regard for the defendant, were also admitted in evidence, as were also declarations to the effect that he had furnished the defendant money with which to engage in business, and had taken notes for it, but that he did not intend that the notes should ever be paid, that he intended to give the amounts so furnished to the defendant. Evidence such as the foregoing, together with testimony showing the rela-

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tions existing between the defendant and the testator, comprised substantially all the evidence in the case, and whether the judgment of the court below shall be affirmed or reversed depends upon whether or not it was competent to arrive at the intention of the testator, as that intention was expressed in the words found in the will, by the aid of extrinsic evidence.

The argument on the appellant's behalf is to the effect that there is no ambiguity apparent upon the face or in the language of the will; that the instrument itself excludes the idea that the testator intended, by its terms, to give the appellee anything in addition to the five hundred dollars therein bequeathed to him; and that any testimony which tended in any degree to impute to the testator a different intention was contradictory of the will, and was therefore incompetent. Moreover, it is contended that there is no ambiguity in the language of the will, either as respects the person intended or the subject-matter of the bequest, and that hence extrinsic evidence was not admissible.

It is settled beyond controversy that whatever method may be resorted to for the interpretation of a will, it must be applied solely with a view to arrive at the intention of the testator, as his intention may be gathered from the language found in the instrument itself. However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution. *Pugh v. Pugh*, 105 Ind. 552; *Judy v. Gilbert*, 77 Ind. 96; *Funk v. Davis*, 103 Ind. 281; *Pocock v. Redinger*, 108 Ind. 573; *Worman v. Teagarden*, 2 Ohio St. 380; 1 Jarman Wills, pp. 711, 726; 2 Pom. Eq. Jur., section 1036.

The maintenance of this rule in its integrity, so that the language found in the instrument shall in truth be the legal declaration of the testator's intentions concerning the dis-

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position to be made of his property after his death, is a matter of transcendent importance, and, as will be seen from the cases cited, in no jurisdiction has the doctrine which denies the right to add anything to a will by parol been adhered to more steadily than by this court.

It does not follow that the law will suffer the manifest purpose of the testator to fail, because he may not have described the objects of his bounty or the subjects disposed of with such accuracy or completeness as that they may always, and with certainty, be identified by the language of the will, without more, or because he may have expressed his intention in an elliptical manner, and without going into such minute detail as to preclude the necessity of inquiry concerning his circumstances, situation and surroundings at the time the will was written, in order to enable the court to understand the meaning and application of the language employed. Nor is it correct to say that because the language employed is in itself intelligent and free from obscurity, extraneous evidence may not be legitimately resorted to in order to place the court which expounds the will in the situation of the testator who made it. "The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed." Wigram Wills, p. 161; *Gilmer v. Stone*, 120 U. S. 586.

It has been said, with what we conceive to be commendable accuracy, that "The points of inquiry under a will may, for general purposes, be classed under three heads:—1. The person intended. 2. The thing intended. And, 3. The intention of the testator with respect to each of them." Wigram Wills, p. 263, note. It may often happen that persons or things, or the intention of the testator respecting them, may seem to be sufficiently defined by the terms of the will, and yet when the language employed, and the facts to which it refers, are brought in contact with each other, the language and the facts are so inharmonious as to leave the intention of the testator obscure. Thus an ambiguity arises, not upon the

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face of the will itself, but from facts therein referred to which are extrinsic to the instrument. This, according to the maxim of Lord Bacon, constitutes the very essence of a latent ambiguity, which he defines to be "that which seemeth certain and without ambiguity for anything that appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity." *Hawkins v. Garland*, 76 Va. 149 (44 Am. Rep. 158).

"An ambiguity which arises not upon the words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or to the subject which they describe," is a latent ambiguity. 1 Am. and Eng. Encyc. of Law, p. 530, and note.

Whenever, therefore, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce or develop a latent ambiguity, not apparent upon the face of the will itself, since the ambiguity is disclosed by the introduction of extrinsic facts, the court may inquire into every other material extrinsic fact or circumstance to which the will certainly refers, as well as to the relation occupied by the testator to those facts, to the end that a correct interpretation of the language actually employed by the testator in his will may be arrived at. *Skinner v. Harrison Tp.*, 116 Ind. 139; *Black v. Richards*, 95 Ind. 184; *Cruse v. Cunningham*, 79 Ind. 402; *Patch v. White*, 117 U. S. 210; *Atkinson v. Cummins*, 9 How. 478; *Chambers v. Watson*, 60 Iowa, 339 (46 Am. R. 70); *Powell v. Biddle*, 2 Dallas, 70 (1 Am. Dec. 263); *Connolly v. Pardon*, 1 Paige Ch. 291 (19 Am. Dec. 433); *Pickering v. Pickering*, 50 N. H. 349; *Tilton v. Society*, 60 N. H. 377; *Hinckley v. Thatcher*, 139 Mass. 477 (52 Am. R. 719); *Morgan v. Burrows*, 45 Wis. 211; *Miller v. Travers*, 8 Bing. 244; *Hiscocks v. Hiscocks*, 5 M. & W. 362; *Wigram Wills*, p. 142.

"In all cases," said TINDAL, Chief Justice, "in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise \* \* \* , the diffi-

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culty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised." *Miller v. Travers, supra*; *Baugh v. Read*, 1 Ves. Jr. 257. It is therefore a fundamental error to assume that a latent ambiguity, such as will justify the admission of evidence of extrinsic facts, can only arise out of some obscurity in the terms employed in the will.

The purpose for which extrinsic evidence may be legitimately admitted is not to add to or vary, or ordinarily to explain, the literal meaning of the terms of the will, or to give effect to what may be supposed to have been the unexpressed intention of the testator, but to connect the instrument with the extrinsic facts therein referred to, and to place the court, as nearly as may be, in the situation occupied by the testator, so that his intention may be determined from the language of the instrument, as it is explained by the extrinsic facts and circumstances. *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 328, 336, and cases cited.

Another rule, of equal importance to that above remarked upon, is to be kept in view, and that is, that while a testator is always presumed to have used the words in which he has expressed his intentions, according to their strict and primary acceptation, so that when there is nothing in the context to show a different purpose, and when the words so interpreted are sensible when applied to the extrinsic facts to which they refer, parol evidence will not be admitted to show that the words were used in some other or popular sense; but if to give the words employed their strict, primary meaning renders the will insensible, or unmeaning, with reference to extrinsic facts and circumstances, courts will then look into all the extrinsic circumstances that surrounded the testator at the time, to see whether the language of the will can be rendered sensible with reference to those circumstances by giving the words used some other proper but secondary mean-



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ing. Wigram Wills, p. 100. This rule finds illustration in a great variety of cases, both American and English. *Gill v. Shelley*, 2 Rus. & M. 336; *Dover v. Alexander*, 2 Hare, 275; *Radcliffe v. Buckley*, 10 Ves. Jr. 195; *Gardner v. Heyer*, 2 Paige Ch. 11.

Thus, where a devise was to the children of the testator, upon inquiry it was disclosed that he had no children, but there were other persons concerning whom he had always, or habitually, spoken as his children, and it was held that they were the persons intended.

This brings us to a point where the general principles above stated may be applied to the case under consideration. Looking at the will, it is at once apparent that the object of the testator's bounty, so far as the subjects here involved are concerned, is the young man he had raised; that primarily the subject of disposition was the further sum of five hundred dollars, and that the intention of the testator respecting the object and subject was, that the young man he had raised should receive a legacy of five hundred dollars, in addition to what he had theretofore given him. In effect the testator declares by his will that, at some time prior to the date of its execution, he had given Philo Rogers money or property, to which his purpose was to add the further sum of five hundred dollars as a legacy. The implication that he had theretofore given the legatee a sum of money, or some other valuable property, is as plain and irresistible as is the declaration that a further sum was to be added to that already given. As is in effect said in *Parker v. Tootal*, 11 H. L. Cas. 143, implication may arise from a form of expression which necessarily implies something else, or from a form of gift which can not be rendered effectual without implying something else. The present, in our opinion, affords an apt example of such a case.

The strict and primary signification of the word "give," is to bestow, to confer or grant, usually without any price or reward, as a donation or gratuity, or, as is said in *John-*

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*ston v. Griest*, 85 Ind. 503, while the word does not invariably indicate an intention to make a gift, that is its usual signification. Attributing to the word its strict and primary meaning, it is disclosed, when the language of the will and the facts therein referred to are brought together, that the language and the facts are insensible and without meaning. The testator, in that sense, had given nothing to the legatee. There was, therefore, an entire want of correspondence between the facts recited and those which actually existed when the will was executed, unless the money to which the further sum of five hundred dollars was to be added was the very money represented by the notes which the administrator is seeking to collect. It is apparent, therefore, that the testator either meant nothing by the implication contained in his will that he had theretofore given the legatee an indefinite sum of money, or some other indefinite thing, or he intended to use the word "given" in a secondary sense. A secondary, but entirely proper, meaning of the word "give" is, "to supply, to furnish with, to afford." Encyclop. Dict.; Anderson Law Dict. Accordingly, it has been held, where a statute made it a misdemeanor to give intoxicating liquor to a minor, that the word "give" was synonymous with "furnish," or "supply," and that the defendant was properly convicted, even though he had sold the liquor to the minor. *Commonwealth v. Davis*, 12 Bush, 240; *Holley v. State*, 14 Tex. App. 505; *Parkinson v. State*, 14 Md. 184.

A latent ambiguity having been disclosed by extrinsic evidence concerning facts referred to in the will itself, upon every principle of right reason, as well as upon an unbroken line of authorities, extrinsic evidence was admissible for the purpose of ascertaining whether a state of facts existed at the time the will was written which corresponded with the words used, by attributing to them a secondary meaning. Upon inquiring into the situation and surroundings of the testator, it was ascertained that his relations with the defendant were substantially such as they were alleged to be in the

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answer; that the money represented by the notes had been furnished or supplied to the defendant by the testator prior to the making of the will, for the purpose of enabling the former to embark in business, and that the testator had often declared that he never intended to require it to be repaid.

It is thus found that by ascribing to the word "given" one of its recognized and fully accepted definitions, and treating it as having been used as synonymous with "furnished" or "supplied," all the apparent discord between the language of the will and the extrinsic facts therein referred to disappear. Upon what rule of construction shall the court refuse to do this? Can it be doubted that the intention of the testator was to have his will, and the facts therein referred to, in accord? And if that was his intention, why should it not be given effect, when it can be done consistent with reason and upon well settled principles of interpretation? The purpose and effect of the evidence admitted was neither to vary the terms of the will nor to add anything to it, so as to arrive at an intention not expressed in the will, but to harmonize the language used with the facts referred to, and thus arrive at the testator's intention as expressed in the will.

It is argued in favor of a reversal, that the will must be regarded as operative to bestow a legacy of five hundred dollars and no more, and that it was hence wholly immaterial what the testator had given the defendant theretofore, since in no event could the amount be enlarged or diminished by the reference to what had theretofore been given. There would be force in this suggestion if the phrase "in addition to what I have already given him" had, and could have, reference to a donation, and was confined to a perfectly executed gift, and nothing else. But, as we have seen, the language is not to be thus interpreted, in view of the circumstances under which it was used. If the will read, "I give \* \* to Philo Rogers, \* \* in addition to what I have already furnished or supplied him, the further sum of five

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hundred dollars," it would hardly be denied but that it might have been shown that the money theretofore furnished the legatee by the testator, even though by way of loans or unexecuted gifts, was that referred to in the will. As we have seen, no violence is done to correct speech to thus read it. Besides, this reading unlocks the meaning of the testator, and makes the will and the facts consistent. An imperfect gift, or even a loan, may be turned into an executed gift or advancement by will, if the intention of the testator to do so satisfactorily appears. *Darne v. Lloyd*, 82 Va. 859 (3 Am. St. R. 123).

The testator did not stand *in loco parentis* to the defendant, upon whom he desired to bestow a portion of his estate, and there was, therefore, no presumption that the money previously given him was in the nature of an advancement, given by way of anticipation of the whole or a part of what might be coming to him at the testator's death. *Ruch v. Biery*, 110 Ind. 444. Because, in no event, could he participate in the testator's property except pursuant to the will. The presumption that a sum of money given is an advancement obtains only between those who occupy the relation of parent and child, or relations kindred thereto. In the absence of the will it would not have been competent to defeat the collection of the notes, which were given in consideration of money received, by proving subsequent declarations made by the testator to the effect that he had given the defendant the money to start him in business, and that he did not intend to collect it. *Denman v. McMahan*, 37 Ind. 241. Thus, where it appeared that a stepmother held a note against her stepson, who had tendered payment to her, which she refused to accept, declaring, in the presence of witnesses, that the payee had made the money for her, and that she never intended to collect it, and that if it was not paid in her lifetime the note was to be surrendered up, it was held that these declarations were simply evidence of an unexecuted intention to give, and not of an executed gift. *McGuire v.*

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*Adams*, 8 Pa. St. 286. Applying the principle declared to the present case, then it follows that it was essential, in order to carry into execution the declared purpose of the testator, that the transactions, which had borne the semblance of loans, but which he intended to convert into gifts, should be controlled by his last will and testament. Hence the bequest of five hundred dollars in addition to what he had already given the boy he had raised, in the manner described. The will operated as effectually upon that which had already been given imperfectly, as upon the five hundred dollars. At this point the present case is parallel in principle with *Jordan v. Fortescue*, 10 Beav. 259, in which it appeared that the testator, in the third codicil to his will, expressed himself as follows: "I give and bequeath to William Jordan 500*l.*, in addition to 1,500*l.* which I have before bequeathed to him." The testator had, in fact, only bequeathed £1,000 to the legatee. It was contended there, as it is here, that the bequest was for £500, and no more. It was held, however, that the sum given in the codicil was given with reference to the amount supposed to have been previously given, and that the effect of the codicil was to entitle the legatee to the full amount of the sums therein named. That the mistake appeared in the previous will in the case cited, in nowise distinguishes that case from the one under consideration, so far as it relates to the force and effect of the instrument. As the effect of the codicil was not only to entitle the legatee to the sum mentioned therein, but also to the sum to which it was supposed to be additional, so the will in the present case is effectual to give not only the five hundred dollars mentioned, but the sum which it must be assumed, in the light of all the facts disclosed, the testator knew he had already imperfectly given, to which the sum mentioned was to be added. The answer of the jury, that the notes were discharged or released by the terms of the will, was, therefore, consistent with the facts, and with the theory upon which the defendant's case proceeded.

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In respect to another interesting feature of the case, which has been presented for consideration, it is only necessary to say, in conclusion, that while there may be some doubt whether or not a legacy given by a creditor to his debtor will, of itself, afford the basis of a presumption that the debt is thereby satisfied, so as to justify the admission of extrinsic evidence, yet, where language contained in the will can only be made consistent with the facts to which it refers, upon the theory that the testator intended the legacy as an additional or cumulative gratuity, the authorities all agree that parol evidence may be heard, showing the manner in which the testator treated and talked of the debt, so as to apply the language of the will to the facts in question, to the end that the real meaning of the language may be ascertained. *Tillotson v. Race*, 22 N. Y. 122; *Zeigler v. Eckert*, 6 Pa. St. 13 (47 Am. Dec. 428). The present case comes within the control of that principle.

The mere fact that a pecuniary legacy is given by a creditor to his debtor was held to be a circumstance entitled to weight in determining whether or not a previous clause in a will, by which the testator in terms released two mortgages on the legatee's property, included a third mortgage not mentioned in the will. *Cleveland v. Carson*, 37 N. J. Eq. 377.

In respect to this last subject we decide nothing at present. There was no error affecting the substantial merits of the case. The judgment is therefore affirmed, with costs.

Filed April 6, 1889; petition for a rehearing overruled June 5, 1889.

#### DISSENTING OPINION.

BERKSHIRE, J.—I am unable to agree with the conclusion reached by the majority of the court. To me the conclusion seems to be unsound on principle, and contrary to a long line of decisions by this court, beginning with its organization and coming down to the present time. Feeling the importance of the questions involved, I regret that I have not the time to express my views at length.

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The action was brought upon certain promissory notes executed by the appellee to the decedent in his lifetime. The theory of the defence is not that the notes were executed without consideration, and merely as the evidence of an advancement, so as to bring it within the case of *Peabody v. Peabody*, 59 Ind. 556, nor is it the theory of the defence that the notes were surrendered and the indebtedness released and forgiven, so as to bring it within the case of *Sherman v. Sherman*, 3 Ind. 337. The theory of the defence is that the decedent, who died testate, by his last will and testament bequeathed the notes in suit and the indebtedness which they evidenced to the appellee. The only item in the will under which this claim is made is item No. 10. It reads thus: "I give, devise and bequeath to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars."

The language is not only not ambiguous, but it is clear and unequivocal. What is it that is given to the appellee? The sum of five hundred dollars. In addition to what is five hundred dollars given? "*In addition to what I have already given him.*" The will only purports to give the appellee five hundred dollars. It is not claimed that the language has the effect to give him more. What kind of a gift is referred to? Evidently a complete and perfect gift. There can be no gift unless there is an intention to give, and, pursuant to the intention, the control and possession of the thing given are parted with by the donor. The thing given and referred to in the will being something, the control and possession of which the testator had parted with before the execution of the will, it could not have been the notes in suit, nor the indebtedness of which they were the evidence.

It is not claimed that the notes were given by the testator in his lifetime to the appellee. The testator did not part with the notes, but held them as a valid and subsisting indebtedness at the time of his death. The words "in addition to what I have already given him," evidently refer to some-

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thing else. If the notes in suit are not what was referred to, then the will must be construed without reference thereto. Giving the will the construction that its language imports, and the only construction which it seems to me can be given to it, and but five hundred dollars is bequeathed to the appellee. If the debt had been forgiven or released by the testator in his lifetime (which is not claimed), then that should have been the defence, and not that it passed by the will.

To permit parol evidence for the purpose of showing that the notes passed by the will, in addition to the five hundred dollars, is simply to enlarge the terms of the will, and give to the appellee several thousand dollars more than the will gives him. In other words, the will which the testator made is, by parol evidence, transformed into a new and different will; that is to say, the will as made by the testator gave to the appellee five hundred dollars, but as made by parol evidence for the testator, and after his death, several thousand dollars. If the will of the testator here under consideration can be thus changed, in my judgment any other like instrument may be so changed, and if this rule is to be applied to wills, then why not to all other written instruments?

I can not yield my assent to what I consider a new and dangerous departure from the well settled rule of law, everywhere prevailing, that parol evidence can not be introduced to change, alter or vary the terms of a written instrument.

OLDS, J., concurs.

Filed April 6, 1889.



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The Louisville, New Albany and Chicago Railway Company v. Power.

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No. 13,201.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. POWER.

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**CIRCUIT COURT.**—*Adjourned Term.*—*Irregularity.*—*Waiver of Objection.*—A party who is in court by counsel when an order for holding an adjourned term is made, and has knowledge of the time determined upon, of the appointment of a special judge to hold said term, and of the setting of his case for trial at said term, but fails to make objection, waives the right to afterwards object that such adjourned term was illegal, as falling within the time for holding court in another county in the same circuit.

**DRED.**—*Delivery.*—*Non Est Factum.*—Where, in an action founded upon a deed, there is no plea of *non est factum*, the execution of the deed, including its delivery, is admitted.

**SAME.**—*Mistake in Grantee's Name.*—*Estoppel.*—Where a deed conveying a right of way is delivered to and accepted by a railroad company, which thereafter asserts title to the land thereby conveyed, it can not repudiate the covenants of the deed on the ground that the grantee was not properly named.

**SAME.**—*Parol Evidence.*—It is competent to prove by parol the facts connected with the preparation of a deed; and, where there is a mistake of fact, it is proper to prove the contract between the parties.

**RAILROAD.**—*Agreement to Build Fences.*—*Measure of Damages.*—For the breach of a contract by a railroad company with a land-owner to fence its right of way, the cost of erecting the fence, and also special damages for animals killed, for damage done by trespassing animals, and for the loss of pasturage, may be recovered.

From the Hamilton Circuit Court.

*G. W. Easley, S. O. Bayless and W. H. Russell*, for appellant.

*D. W. Patty, R. R. Stephenson and W. R. Fertig*, for appellee.

**ELLIOTT, C. J.**—The counties of Hamilton and Madison constituted the twenty-fourth judicial circuit at the time this action was tried. On the 29th day of the regular November term, 1885, an order was made reciting that the judge of the

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court had been an attorney in many cases, and directing that an adjourned term of the court be held, commencing on the first Monday in January, 1886. Notice was given according to law. At the time the order was made the defendant's counsel were in court, and, as the bill of exceptions recites, "knew of the time and manner determined upon for holding the adjourned term, and of the appointment of Judge Goodykoontz to hold the same, and knew that this cause had been set down for trial at the adjourned term, and made no objection, but tacitly consented thereto; and that counsel for defendant did not, nor did any other person, give any notice or intimation that the defendant would object to the trial being had at the adjourned term before Judge Goodykoontz until the cause had been called for trial and both parties were present with their witnesses; and, further, the defendant's counsel were present at the adjourned term at a day previous to the trial, and at the time when the day for the trial was fixed by Judge Goodykoontz and the case placed on the calendar for trial, and offered no objections of any kind whatsoever." The only objections interposed are set forth by the reporter in his report of the evidence.

It is here insisted that as the time appointed for the adjourned term fell within the time for holding court in the county of Madison, the adjourned term could not be legally held in the county of Hamilton. The appellee insists that the question is not presented, because the objections appear only in the reporter's long-hand manuscript, and that the statute does not authorize the reporter to note such objections. We are referred to sections 1405 and 1407, R. S. 1881, which seem to support the appellee's contention, but we do not deem it necessary to decide this point. Nor do we deem it necessary to decide whether, if there had been opposition, instead of acquiescence, the appellant could have successfully maintained the proposition that the adjourned term of the Hamilton Circuit Court was illegally held, for we are satisfied that by acquiescence the appellant waived the

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right to object. There was color of authority, at least, for holding the adjourned term; the court assumed to act under the law, and as the appellant acquiesced, it is not now in a situation to successfully assail the proceedings. If there had been no color of authority for holding the adjourned term it might be different, but there is a law authorizing courts to hold adjourned terms, and to fix the time for holding them; and under this law the court acted, with the acquiescence of the defendant, so that the adjourned term was not held wholly without warrant of law, and, even if it be conceded that the term was irregularly held, the proceedings were not absolutely void. *Smurr v. State*, 105 Ind. 125, and authorities cited. There are provisions in the statute which declare that adjourned terms may be held, and that an adjourned term, "presided over by a judge appointed for that purpose, may be extended so as to include the time set apart for the court in any other county of that circuit." If, therefore, there was an error, there was not an entire absence of power, since the utmost that can be said, if, indeed, so much can be said, is, that the court erred in deciding a question of law which it had authority to decide, and such an error may be waived. The doctrine of waiver applies to many cases, even to those where life and liberty are involved, and it applies here. *Street v. Chapman*, 29 Ind. 142; *Croy v. State*, 32 Ind. 384; *Murphy v. State*, 97 Ind. 579; *Schlunger v. State*, 113 Ind. 295; *Ard v. State*, 114 Ind. 542; *Mannix v. State, ex rel.*, 115 Ind. 245. The general rule is that a party who fails to object at the earliest seasonable opportunity is deemed to waive the objection. This rule is one of wide application.

There was no plea of *non est factum*, and the execution of the deed, on which the action is founded, was admitted. The delivery was essential to its validity, and was a part of its execution.

The deed purported to be executed to the Chicago and Indianapolis Air Line Railway Company, and this was not the

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name of the real grantee, but we think that the evidence satisfactorily explains the mistake. If, however, this were not so, the appellant could not assert title under the deed and repudiate its covenants. Holding the land under the deed, as it did, it was bound to perform its contract. To permit it to retain the land and repudiate the deed would be against equity and good conscience. *Bloomfield R. R. Co. v. Grace*, 112 Ind. 128; *Bloomfield R. R. Co. v. Van Slike*, 107 Ind. 480; *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464. In this instance the deed conveying the right of way, with other deeds, was delivered directly to the appellant, and its only claim of right to the land rests on that deed, and it is, therefore, in no situation, after having accepted the deed and received the land under it, to impeach its validity on the ground that the grantee was not properly named.

It was competent to prove the facts connected with the preparation of the deed by parol, and in permitting this to be done the court did not violate the familiar rule forbidding the contradiction or change of a written instrument by parol evidence. It was, indeed, proper, as it always is, to prove the contract between the parties, where, as here, there was a mistake of fact. To deny this would be to affirm that a mistake can not be corrected, since, without evidence of the facts, it can never be made to appear that there was a mistake.

The facts, so far as concerns the amount of the recovery, are substantially the same as those of the case of *Louisville, etc., R. W. Co. v. Sumner*, 106 Ind. 55, and the decision in that case rules here. The rule there declared for the admeasurement of damages is the correct one, and has been approved. *Indiana, etc., R. W. Co. v. Adams*, 112 Ind. 302; *Chicago, etc., R. W. Co. v. Barnes*, 116 Ind. 126. That rule is this: "For the breach of a contract by a railroad company with a land-owner to fence its right of way, the cost of erecting the fence and also special damages for animals killed, for

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damage done by trespassing animals, and for the loss of pasturage, may be recovered.”

Judgment affirmed.

Filed June 4, 1889.

No. 12,927.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. HART ET AL.

RAILROAD.—*Negligence.—Accumulation of Combustible Material on Right of Way.—Destruction of Adjoining Property.*—If a railroad company negligently permits grass and other combustible matter to accumulate upon its right of way, and fire, emitted from one of its passing locomotives, falls upon and ignites such combustible matter and from thence spreads to the land of an adjoining proprietor and destroys his property, without any fault on his part, it is liable for the loss sustained.

SAME.—*Adjoining Proprietor.—Not Bound to Keep Grass Burned off his Premises.*—A person owning land adjoining a railroad is not bound to keep the grass burned off of his land between his hay-stacks and the right of way, and his failure to do so does not constitute negligence.

TENANTS IN COMMON.—*Crops.—Destruction by Third Person's Negligence.—Right of Action.*—Where, under an arrangement between the owner of land and another person, the latter harvests the hay grown upon the land and gathers the whole of the yield into stacks, he to have three-fifths of the hay and the owner of the land two-fifths, the parties become tenants in common of the hay, and if it is destroyed by the negligence of a third person prior to a severance of their interests, they may maintain a joint action for damages.

SAME.—*Severance of Interests.—What Sufficient to Constitute.*—Prior to the destruction of the hay, each stack was measured and marked so as to leave three-fifths of the stack on one side of the division line and two-fifths on the other, the first portion being designated as that of the harvester and the second as that of the owner of the land, and it was agreed that

119	273
121	304
121	566
122	286
123	294
119	273
128	417
119	273
131	169
119	273
137	390
138	126
119	273
141	381
142	222
119	273
147	174
119	273
150	162
119	273
154	324
154	331

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either party could, at his convenience, cut the stacks and take the portion belonging to him. At the time of the destruction of the hay, no severance of the stacks had taken place.

*Held*, that the common ownership continued until there was a manual separation or division of the property.

**SUPREME COURT.**—*Assignment of Error.*—*Practice.*—The giving or refusing to give instructions, and the overruling of a motion to strike out part of a verdict, can not be independently assigned as errors in the Supreme Court, but must be assigned as causes, for a new trial in the motion therefor, and thus brought up for review.

**VERDICT.**—*Special.*—*Venire de Novo.*—*Practice.*—An objection that a special verdict, which is otherwise sufficient, does not cover the issues in the cause, or so far cover them that the plaintiff is entitled to a judgment, is not presented by a motion for a *venire de novo*, but by a motion for a new trial or by a motion for judgment on the verdict.

**SAME.**—*Omission of Facts.*—*Harmless Error.*—When a special verdict contains no finding as to certain facts alleged in the complaint, such facts will be regarded as found against the plaintiff, and the refusal of the court to give instructions asked by the defendant relating to such facts is at most a harmless error.

**SAME.**—*Motion to Strike Out.*—A motion to strike out part of the verdict of a jury will not lie, but if the part objected to is immaterial it will be treated by the court as surplusage.

**SAME.**—*Instructions.*—Where a special verdict is demanded, it is improper to instruct the jury generally concerning the law of the case, but they may be instructed as to the nature of the action, the issues, the form of the verdict and their general duties.

From the Porter Circuit Court.

*G. W. Easley, G. R. Eldridge, G. W. Friedley and W. Johnston*, for appellant.

*H. A. Gillett and J. W. Youche*, for appellees.

**BERKSHIRE, J.**—This is an action brought by the appellees against the appellant, whereby they seek to recover damages for the loss of a certain lot of hay which they allege was burned and destroyed because of the appellant's negligence.

The complaint is in one paragraph. The appellant first filed a demurrer thereto, alleging want of facts sufficient to constitute a cause of action, which was overruled by the court; to which ruling it excepted, and then filed an answer

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in general denial. The issue joined was submitted to a jury, who returned a special verdict; after the return of the verdict the appellant moved for a *venire de novo*, which was overruled and an exception reserved; it then moved to strike out parts of the verdict, which motion was overruled and an exception taken; it then moved to reject the verdict, which motion was overruled and an exception saved; it then moved for a new trial, which motion was overruled and an exception reserved; after which the court rendered judgment for the appellees.

There are several errors assigned: (1) Error of the court in overruling the demurrer to the complaint. (2) Error committed by the court in refusing instructions asked by the appellant. (3) The court erred in instructions given on its own motion. (4) The court erred in overruling the motion for a *venire de novo*. (5) Error committed by the court in overruling the motion to strike out parts of the special verdict. (6) Error of the court in overruling the motion for a new trial. (7) That the court erred in rendering judgment for the appellees on the special verdict of the jury.

The giving or refusing to give instructions can not be assigned as error in this court, but must be assigned as reasons for a new trial, and brought before this court for review under the assignment of error because of the overruling of the motion for a new trial. The overruling of a motion to strike out parts of the verdict of the jury can not be assigned as error in this court, but must be assigned as a reason for a new trial, and is presented to this court for review under the assignment of error because of the overruling the motion for a new trial. We must, therefore, disregard the second, third and fifth errors assigned, but this can make no difference as to our conclusion in the case, for the questions to which these assignments of error relate are properly presented in the motion for a new trial.

The negligence which is charged in the complaint is, that

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on the 17th day of November, 1883, there was a large accumulation of dry grass, weeds and other combustible matter on the defendant's right of way to the east of the road-bed, and adjacent to and adjoining the tract of land upon which the appellees' hay was situated; that the appellant had, for a long time theretofore, been negligently and carelessly suffering such dry grass, weeds and other combustible matter to accumulate, and was, at the time, negligently suffering and permitting such accumulation to remain, and while the same was so remaining, and on the day stated above, the appellant carelessly and negligently ran a locomotive engine adjacent to and within twenty-five feet of such accumulation, which engine was then and there so negligently, carelessly and insufficiently constructed and equipped, and then and there so carelessly and negligently managed and operated by the appellant, that it emitted and threw out large coals of fire, which alighted upon and set fire to said accumulation of combustible matter, and the fire so set and started did, through the negligence and carelessness of the appellant, escape and communicate with and set fire to the grass and stubble on the tract of land on which appellees' said hay was situated, and from thence, through the negligence and carelessness of the appellant, escaped and communicated with and set fire to the grass and stubble on the tract of land on which the appellees' hay was situated, and from thence, through the negligence of the appellant, spread and ran along the ground, communicated with and set fire to the hay of the appellees, which was then and there and thereby wholly consumed and destroyed. Then follows a general averment that the appellees were not guilty of negligence contributing to the injury.

We do not care to spend any time upon the complaint; it is an exceedingly well prepared pleading, evidently having been prepared with much care and consideration, and states a good and sufficient cause of action. *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. W. Co. v.*



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*Krinning*, 87 Ind. 351 ; *Louisville, etc., R. W. Co. v. Hannmann*, 87 Ind. 422.

The court committed no error in overruling the motion for a *venire de novo*. The verdict was not defective or uncertain, but is clear and explicit as to the facts found by the jury. If it does not cover the issues in the case, or so far cover them as to entitle the appellees to a judgment, the question is not presented by a motion for a *venire de novo*, but must be presented as a reason in the motion for a new trial, or by the motion for a judgment upon the verdict. The question is properly presented in both ways. *Bartley v. Phillips*, 114 Ind. 189 ; *Johnson v. Culver*, 116 Ind. 278 ; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582 ; *Vinton v. Baldwin*, 95 Ind. 433 ; *City of Lafayette v. Allen*, 81 Ind. 166 ; *Trittip v. Morgan*, 99 Ind. 269 ; *Dixon v. Duke*, 85 Ind. 434.

The special verdict returned by the jury is as follows :

“ We, the jury, having been required to find a special verdict in this action, do find the facts in this case to be as follows : That, on the 17th day of November, 1883, said defendant was a railroad corporation, duly organized, and was controlling and operating a railroad in Lake county, Indiana, and had charge and control of the right of way over and along which said railroad ran ; that said railway company was organized under the laws of said State, and constructed its said railroad in said county in the year 1880, and so constructed the same between the town of Dyer, in said county, to the Chicago and Grand Trunk Railroad, near a station in said county called Maynard, over and across an open level prairie country for a distance of four miles, and so constructed its said railroad by then and there digging parallel ditches, and with the earth taken from said ditches making a permanent road-bed for said railroad between the same, and had controlled and operated its railroad, so constructed, from said time up to and including the said 17th day of November, 1883 ; that, on said last mentioned day, there was stacked on lands lying adjacent to, and east of, said railroad,

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between the points aforesaid, 472 tons of hay, in twelve large stacks; that the nearest of said stacks was distant about twenty-five rods, and the farthest about one hundred and sixty rods, from defendant's said railroad; that the land between the said right of way of said railroad and said stacks, and the land where the said stacks were situated, was hay land, and had all been mowed over and the hay made thereon during the summer of 1883; that upon said day there was also situated upon said land, near said stacks, thirty tons of hay in cocks; that said hay in said stacks was then and there of the value of \$2,832, and said hay in cocks was then and there of the value of \$165; that on said day there had accumulated in the said ditch aforesaid, on the east side of defendant's said road-bed, and upon said defendant's said railroad right of way, a large quantity of dead, dry and combustible grass, weeds and rubbish, which had been so accumulating during that and former years, and which had been so accumulating ever since the construction of said railroad as aforesaid; that the said defendant had never in any manner removed or cleared off, nor attempted to remove or clear off, said grass, weeds or rubbish, but that defendant, from the time its road was so constructed up to the said 17th day of November, 1883, suffered and permitted said accumulation of dry grass, weeds and rubbish to be and remain upon its said right of way, although there was no hindrance to the removal thereof during any of said time; and while the same was so remaining, and on said 17th day of November, 1883, the defendant ran an engine and train of loaded freight cars over and along its said road between its said points, and adjacent to the said land where the said hay was so situated, and that sparks and coals of fire were then and there emitted from said engine, which dropped into said ditch and then and there ignited the said dry grass, weeds and rubbish, so accumulated as aforesaid, and the fire thus started ran through said grass, weeds and rubbish, up to the back of said ditch, and communicated directly with, and set fire to, the grass stubble beyond the

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bounds of said ditch, and from thence ran and extended rapidly along the grass stubble in the direction and to the said hay and hay-stacks, and set fire to and burned up and consumed all of said hay and hay-stacks; that the place where the said dry grass, weeds and rubbish was so ignited by said sparks and coals of fire, so emitted from said locomotive, was twenty-three feet east of the center line of the railroad track of said defendant's railroad; that the place where said dry grass, weeds and rubbish so accumulated as aforesaid was near the center of a level, treeless prairie, about five miles in width, north and south, and about twelve miles in length, east and west; that the place where the said fire so started was upon the defendant's said railroad right of way; that the plaintiffs tried hard, and did all in their power, to arrest the said fire, and to prevent the burning of said hay, but owing to the dryness of the season, and the rapidity with which said fire spread, all their efforts were unavailing; that the said hay in said stacks, and the said hay in said cocks, at the time the same was so burned up, all belonged to the said Martha R. Hart, Malcolm T. Hart, Milton R. Hart, Flora N. Biggs, Christian Schultz and James W. Hart; that the said James W. Hart, since the commencement of this suit, died in said Lake county testate, and said Julia B. Hart is the executrix of said deceased, having been legally appointed as such by the circuit court of said county, and having duly qualified.

"Now, if, upon the facts aforesaid, plaintiffs are entitled to recover, we find for the plaintiffs, and assess their damages at \$2,997.

E. S. BEACH, *Foreman.*

"But, if, upon said facts, the verdict should be for the defendant, then we find for the defendant.

"E. S. BEACH, *Foreman.*"

We come now to the motion for a new trial. The motion assigns twenty reasons for a new trial: 1. The court erred in refusing instructions. 2. The court erred in giving instructions. 3. The court erred in overruling the motion for a *venire de novo*. 4. Because the damages are excessive.

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4½. Because the verdict is contrary to the evidence. 5. Because the evidence shows that the plaintiffs are not joint owners of the property. 6. Because the verdict does not contain all the material facts given in evidence. 7. Because the verdict fails to show want of contributory negligence on the part of the plaintiffs. 8. Because there is no finding as to the condition of the engine which it is charged emitted the fire. 9. Because the verdict finds only an evidentiary fact, and not an ultimate or inferential fact, that said engine was not properly equipped. 10. Because the verdict does not contain, and does not purport to contain, a finding upon all the material issues. 11. Because the verdict finds nothing as to whether or not the hay had been divided before its destruction. 12. Because the verdict, in so far as it finds that dry grass and other combustible matter accumulated on the right of way, finds simply evidentiary facts and not an ultimate fact from which the court can draw an inference or conclusion. 13. Because the verdict contains no finding as to whether the engine which set out the fire was carelessly and negligently operated. 14. Because the verdict finds nothing as to the manner in which the engine was constructed and equipped. 15. Because the verdict finds nothing as to the circumstances under which the fire escaped from the engine. 16. Because there is no finding that the damages sued for were the result of negligence on the part of the defendant and no negligence on the part of the plaintiffs. 17. Because the usual custom is not stated in the verdict in regard to burning between stacks situated as the plaintiffs' stacks were and the railroad track. 18. Because there is no finding as to the omission of the plaintiffs to burn between their stacks and the railroad. 19. Because the court erred in overruling the motion to strike out parts of the special verdict. Some of the reasons assigned present no question for the consideration of the court, and others are duplicated.

It was not necessary, to entitle the appellees to recover, to

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prove all the acts of negligence charged in the complaint. The complaint would have been a good and sufficient complaint if it had omitted all that is charged therein as to the condition of the engine, and the manner in which it was operated. If a railroad company negligently and carelessly permits grass and other combustible matter to accumulate upon its right of way, and fire is emitted from one of its passing locomotives and falls upon the grass or combustible matter that has been allowed to accumulate from want of proper care on its part, and the fire spreads and passes over upon the lands of the adjoining proprietor and burns and consumes his property, he being guilty of no negligence contributing to the injury, the railroad company is liable for the loss sustained. *Indiana, etc., R. W. Co. v. Overman*, 110 Ind. 538; *Pittsburgh, etc., R. W. Co. v. Jones*, 86 Ind. 496; *Brinkman v. Bender*, 92 Ind. 234; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225.

As the verdict states nothing as to the condition of the engine, or as to the manner in which it was operated, the facts thus omitted must, therefore, be regarded as found against the plaintiffs. *Parmater v. State, ex rel.*, 102 Ind. 90; *Johnson v. Putnam*, 95 Ind. 57; *Glantz v. City of South Bend*, 106 Ind. 305; *Spraker v. Armstrong*, 79 Ind. 577; *Indiana, etc., R. W. Co. v. Barnhart*, 115 Ind. 399; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566.

The appellant is, therefore, not injured because of the failure of the jury to find as to these matters, and as to any instructions asked for by the appellant and refused by the court, relating to the condition of the engine and the manner of its operation, the same answer may be made.

The court committed no error in overruling the motion to strike out parts of the verdict, because: 1. The matter to which the motion relates is a proper and material part of the verdict. 2. A motion to strike out a part of a verdict is not proper practice. It can subserve no useful purpose, and unnecessarily encumbers the record. If the matter objected

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to is immaterial, the court will treat it as surplusage, and the party making the motion can not, therefore, be prejudiced because of the immaterial matter ; but if the matter objected to is material, then it should not be stricken out. 3. And, if the court should entertain a motion to strike out a part of a verdict, then the verdict would no longer be the verdict of the jury, but the verdict or finding of the court. See *Louisville, etc., R. W. Co. v. Flanagan*, 113 Ind. 488.

If, as contended by the appellant, the appellees were owners of the hay in severalty when it was burned and destroyed, they can not recover in this action, and the circuit court should have granted a new trial.

The finding of the jury is, that the hay was the common property of all when destroyed, and there is no contention on the part of the appellant but that it was so held by the appellees when put into the stacks ; but the contention is, that afterwards, and before its destruction, there was a division, and that the parties became owners in severalty of separate parcels, except as to a small portion that had never been stacked. There is no controversy in the evidence as to what took place looking to a division.

The evidence shows that the appellees, other than Schultz, were the owners of the land upon which the hay was grown, and upon which it was standing when destroyed. Schultz had harvested the hay, and, by virtue of the arrangement whereby he did so, he became the owner of the undivided three-fifths of it, and the other appellees the owners of an undivided two-fifths. By the arrangement the parties were tenants in common of the hay. *Goell v. Morse*, 126 Mass. 480 ; *Cushing v. Breed*, 14 Allen, 376 ; *Kilgore v. Wood*, 56 Maine, 150 (96 Am. Dec. 440) ; *Forbes v. Boston, etc., R. R. Co.*, 133 Mass. 154 ; *Keeler v. Goodwin*, 111 Mass. 490 ; *Bryant v. Clifford*, 13 Metc. 138 ; *Lowe v. Miller*, 3 Grattan, 205 (46 Am. Dec. 188).

There is no conflict between the conclusion reached in this case and the case of *Chicago, etc., R. W. Co. v. Linard*, 94

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Ind. 319. As we have said, it is conceded that the parties were common owners until the division contended for, and the evidence shows beyond controversy that the hay was stacked as common property.

If the appellees continued to be owners in common of the hay down to the time of its destruction, the action was properly brought in the name of all the common owners. *Wall v. Hinds*, 4 Gray, 256. In that case the parties were tenants in common of real estate, which was rented under a contract whereby the tenant agreed to pay one-half the rent to each of the two owners, and the action was brought to recover rents. Unless there has in some way been an actual severance of ownership, tenants in common must join in an action relating to the common property. *Clapp v. Institution for Savings*, 15 R. I. 489 (2 Am. St. Rep. 915); R. S. 1881, section 262; *Wright v. Mack*, 95 Ind. 332; *Western Union Tel. Co. v. Huff*, 102 Ind. 535; *Dorsett v. Gray*, 98 Ind. 273; *Kidwell v. Kidwell*, 84 Ind. 224.

The appellees remained tenants in common until the tenancy was severed by an actual division made between themselves. *Walker v. Fitts*, 24 Pick. 191; *Thompson v. Mawhinney*, 17 Ala. 362 (52 Am. Dec. 176).

There was no division of the hay by stacks; each stack was measured and marked so as to leave three-fifths of the stack on one side of the division line, and two-fifths on the other, and the three-fifths was designated as the part that was to go to Schultz, and the two-fifths as the part that was to go to the other appellees, and it was agreed that either, at his or their convenience, could cut the stacks and take the portion or part designated as going to him or them. No severance of the stacks had taken place when the fire occurred. Until there was an actual severance the common ownership continued; until then, all that can be said of the arrangement is that it was an agreement to sever the tenancy or ownership. *Sullivan v. McLenans*, 2 Iowa, 437 (65 Am. Dec. 780); *McKee v. Garcelon*, 60 Maine, 165 (11 Am.



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Rep. 200); *Kimberly v. Patchin*, 19 N. Y. 330; *Channon v. Lusk*, 2 Lans. 211; *Sale v. Sun Mutual Ins. Co.*, 3 Robt. 602; *Clark v. Griffith*, 24 N. Y. 595; *Brizendine v. Frankfort Bridge Co.*, 2 Ben. Mon. 32 (36 Am. Dec. 587); *Baker v. Jewell*, 6 Mass. 460; *Boston, etc., R. R. Co. v. Portland, etc., R. R. Co.*, 119 Mass. 498; *Richmond v. Parker*, 12 Metc. 48; *Austin v. Walsh*, 2 Mass. 401; *Peters v. Davis*, 7 Mass. 257; *Lacy v. Weaver*, 49 Ind. 373.

In *Tripp v. Riley*, 15 Barb. 333, it is said, while conceding that the common law furnished no remedy, that one co-owner may sever his share in grain and other articles which can be weighed or measured, and, of course, may hold exclusive possession of the part thus severed.

Pomeroy, in his Remedial Rights, says: "The right of either co-owner may be transferred by any valid act *inter vivos*, and it may be devolved at his death; but it is impossible by any legal compulsory means for one to enforce a partition against his fellow owners, even when such division would be physically possible, unless it be true, as said in one case (*Tripp v. Riley, supra*), that such owner may manually separate, and afterwards hold for his own exclusive use, when the chattels themselves are capable of being weighed or measured, so that an accurate division can easily be made,—as in case of grain." Section 221.

The many authorities we have cited are not directly to the point, but we think they throw some light upon the principle involved. We were somewhat surprised, when we came to look into the authorities, to find so little upon the question as to what is necessary as between the tenants to sever a tenancy in common of personal property. But from the investigation which we have made, and the authorities cited, we are brought to the conclusion that there must be a manual separation or division of the common property. And if this is not so, in the case under consideration, after the measurement and before the destruction of the property, there were many particles or straws in which the parties



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were common owners, or else Schultz was the owner of these straws at one end and the other appellees the owners at the other end.

It is argued by appellant's counsel that what was done in the way of a division would have been sufficient to have passed the title in the case of a sale, and, therefore, was sufficient to sever the tenancy or common interest in the property.

We are inclined to the opinion that had Schultz been the owner of the whole of the hay, and had bargained the undivided three-fifths thereof to some other person, and then had marked it off, as was done, that would have been sufficient to have passed the title to an undivided three-fifths of the hay to the purchaser, but that is a very different question from the one under consideration. As to what will amount to a sale, so as to pass the title to property, depends a great deal on the intention of the parties and the character of the property, but in view of the length of this opinion we do not feel justified in going into a consideration of that question.

Where a special verdict is demanded, it is improper to instruct the jury generally concerning the law of the case, but instructions concerning the nature of the action, the issues, the form of the verdict and the general duties of the jury are proper. *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Toler v. Keiher*, 81 Ind. 383; *Woollen v. Wire*, 110 Ind. 251; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

We do not think the court erred in refusing to give the instructions asked for by the appellant. The instructions given by the court on its own motion were right and proper, and no error was committed in giving the same.

The facts as found by the jury are not evidentiary facts, but issuable facts, and the facts found show that the appellant carelessly and negligently permitted grass, weeds and other combustible matter to accumulate on its right of way, and that the same ignited and took fire from coals and sparks emitted from one of its locomotive engines, and that it care-

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lessly and negligently suffered the fire to communicate with and destroy and consume the hay of the appellees, and while it is not stated in so many words that the negligence of the appellees did not contribute to the injury, the facts as found rebut negligence on their part. The appellees were not required to keep the grass burned off of the lands on which the hay was stacked, and between the stacks and the right of way, and were not, therefore, guilty of negligence because of a failure so to do. *Hoffman v. Chicago, etc., R. W. Co.* (Minn.), 41 N. W. Rep. 301.

We find no error in the record, and, therefore, affirm the judgment, with costs.

Filed June 5, 1889.

119	286
121	476
119	286
126	57
127	270
119	286
130	482
130	502
119	286
138	110
139	610
119	286
143	557
143	565
119	286
145	603
119	286
150	624
119	286
160	695

No. 13,709.

WILSON v. CAMPBELL ET AL.

**FRAUD.—*Special Finding.***—Where fraud is essential to the existence of a cause of action, the plaintiff will fail if it is not found and stated in the special finding as a substantive fact.

**REAL ESTATE.—*Parol Contract to Convey.***—*Heirs.*—*Creditors.*—A parol agreement for the conveyance of land, if valid between the parties, can not be successfully assailed by their heirs or grantees, even if fraudulent as to creditors.

**SAME.—*Adverse Possession.***—*Title.*—Adverse possession for twenty years, under claim and color of right, gives a perfect legal title in fee simple, without regard to the occupant's reasons for not taking a conveyance.

**SAME.—*Purchaser.***—*Inquiry.*—One who buys real estate with knowledge that a third person is in possession, is put upon inquiry as to the rights of the latter.

**SAME.—*Character of Possession.***—A purchaser has no right to suppose that a son is in possession as heir, when the latter's possession began many years before the father's death.

From the LaPorte Circuit Court.

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Wilson v. Campbell *et al.*

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*L. Hubbard and M. H. Weir*, for appellant

*F. E. Osborn, D. J. Wile and F. F. Reed*, for appellees.

ELLIOTT, C. J.—The appellant claims an undivided interest in the land in controversy, and prays an order of partition. The facts are thus stated in the special finding: “In the year 1856, one Alexander B. Campbell purchased, in part on credit, the real estate mentioned and described in the plaintiff’s complaint, intending it for his son, the defendant William H. Campbell; in 1859, the year of said defendant’s marriage, Alexander B. Campbell made a verbal agreement with the defendant, in which it was agreed that if he, the defendant, would help to pay for the land and stay at home and assist his father the land should be his, and that the same should be conveyed to him; that in pursuance of this agreement, Alexander B. Campbell, in the year 1859, put the defendant in possession of the real estate, and he, the defendant, has since that time continuously (except as hereinafter stated) openly, notoriously, peaceably and adversely held possession of the land, and so held it at the time of the commencement of this action, living on the same and acting as owner; that shortly after going into possession of the premises the defendant erected thereon a log-house, and afterwards planted and cultivated an orchard, and has tilled and farmed, used and occupied the same as and for his own, with the knowledge, during his lifetime, of Alexander B. Campbell; that he used and occupied the house upon the premises as and for a dwelling during the period of his occupancy as aforesaid, and there reared his family; that the defendant complied with all of the conditions of his agreement with his father, and in all things used the premises in the manner aforesaid with his knowledge and consent; that Alexander B. Campbell, at various times, recognized the defendant as the owner of the land, and gave it out in speeches that the land belonged to the defendant; that since the year 1859 the defendant has furnished the means wherewith to

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pay the taxes on the land ; that Alexander B. Campbell died intestate, still holding the legal title to the land, on the 2d day of March, 1883, leaving surviving, as his sole and only heirs-at-law, his widow, Susannah Campbell, and six children, to wit, Margaret Collins, Mary Nelson, Catherine Knapp, Susan Stevens, Alexander C. Campbell and the defendant William H. Campbell ; that the decedent had not, during his lifetime, made the defendant a conveyance of the premises ; that in the month of August, 1883, Mary Nelson and Catherine Knapp, their respective husbands joining, conveyed, by quitclaim deeds, to the plaintiff, together with other property, the undivided two-ninths of the real estate, for the sum of six hundred dollars, which was paid by plaintiff, and plaintiff has since that time claimed to be the owner of such undivided two-ninths ; that at the time of such conveyance, and for twenty years prior thereto, the plaintiff aforesaid had notice of the fact that William H. Campbell was in possession of the land, but the plaintiff had no actual knowledge of the fact that he claimed any title thereto, and at the time of her purchase supposed and believed that William H. Campbell was seized and possessed of only the one-ninth part of the land, and that he held such interest as the heir of his deceased father. It is further found that during the life of Alexander Campbell, the defendant William H. Campbell was in debt, and that there were unpaid judgments against him, and that Alexander Campbell held and retained the title to the land in his own name in order to prevent it from being levied on to pay such judgments, and William H. Campbell consented that his father should hold such title, and did not at any time during his father's life demand of him a deed for the land ; that this tract, and another forty-acre tract on which Alexander Campbell lived, lay side by side ; that for fifteen years preceding the last two years of the lifetime of Alexander Campbell, William H. Campbell farmed both tracts ; that there was but one barn in use on both tracts, which was on the land on which the father resided ; that

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after the marriage of William H. Campbell one Collins, a son-in-law of Alexander Campbell, lived in the log-house on the land for one winter, and another son-in-law, during another summer, lived in the log-house. The defendant Andrew J. Westervelt has a mortgage on the property, made by William H. Campbell since 1883. The deeds of the plaintiff for the land were duly recorded in September, 1883."

Conclusions of law were stated by the court, as follows:

"*First.* That the defendant William H. Campbell is the owner, in fee simple, of the real estate.

"*Second.* That the plaintiff has no interest in any part thereof.

"*Third.* That the plaintiff's claim is a cloud upon the defendant's title.

"*Fourth.* That, as against the plaintiff, the defendant is entitled to have his title quieted.

"*Fifth.* That the defendants are each entitled to recover of the plaintiff their costs herein expended."

It is a settled rule of practice that a special finding must state facts, and not merely evidence. The law is to be applied to the facts, and where material facts are absent the party who has the burden will fail. This rule governs here, and decides against the appellant the point she makes upon that part of the special finding which states that the son was indebted and that the father retained the legal title to prevent creditors from seizing the land. This statement may tend to establish fraud, but it does no more; it does not, at all events, show that there was a fraudulent conveyance. Where a conveyance is assailed as fraudulent, much more must be shown than appears here, for, to mention one of the things that must be shown, it must be shown that the debtor had no other property subject to seizure on execution. *Sell v. Bailey*, ante, p. 51, and cases cited.

Fraud is a question of fact, and not of law. *Rose v.*

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*Colter*, 76 Ind. 590. Where fraud is essential to the existence of a cause of action, it must be found and stated in the special finding as a substantive fact or the plaintiff will suffer defeat. *Phelps v. Smith*, 116 Ind. 387; *Bartholomeo v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254; *Elston v. Castor*, 101 Ind. 426. It is not enough that the special finding contains evidence tending to establish fraud, for the law requires that the ultimate fact be stated.

The parol agreement, if valid between the immediate parties, can not be successfully assailed by their heirs or grantees, even if fraudulent as to creditors. We can not perceive what benefit the appellant could derive from proving that the father intended to aid the son in defrauding creditors. Creditors, perhaps, might have had the agreement declared invalid so far as it was adverse to their interests, but the appellant has no such right. *Laney v. Laney*, 2 Ind. 196; *Springer v. Drosch*, 32 Ind. 486; *Garner v. Graves*, 54 Ind. 188. The defendant in this case relies upon possession under the parol agreement, and as that possession continued for twenty years, his title became one in fee as completely as if there had been a conveyance when he entered into possession. If the question in the case was as to the right of the appellee to a specific performance of the parol contract, then there would be, perhaps, some plausibility in the argument of counsel that the fraudulent purpose vitiated the agreement, but the adverse possession under claim and color of right gave him a complete and perfect title.

We are unable to find any essential element of estoppel in the special finding. The appellee did nothing to mislead or deceive the appellant. He was in possession of the land, acting as the owner. When the appellant bought, as she did, with knowledge of the possession by the appellee, she was put upon inquiry as to the right by which he claimed and held possession.

The possession of the appellee began long before his father's death, so that the appellant had no right to suppose that he

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entered into possession as one of the heirs entitled to an undivided part of the land. If possession had been taken after the father's death, there might possibly be force in the appellant's argument and relevancy in the authorities cited, but the possession was taken twenty years and more before the father died.

Counsel for appellant thus state the general question: "Was the possession of the son constructive notice to the purchaser of his equitable title to the whole forty acres?" As often happens, this question contains an illicit assumption, and that is that the appellee's title is an equitable one. This assumption is directly opposed to the true legal doctrine, for the right of the appellee had ripened into a perfect legal title, and was not a mere equitable claim. *Roots v. Beck*, 109 Ind. 472; *Riggs v. Riley*, 113 Ind. 208; *Outsinger v. Ballard*, 115 Ind. 93. The title acquired by adverse possession is a fee simple. *Sims v. City of Frankfort*, 79 Ind. 446.

The judgment is affirmed.

Filed June 6, 1889.

No. 13,745.

PICKEL v. THE PHENIX INSURANCE COMPANY, OF  
BROOKLYN.

**INSURANCE.—Indivisible Risk.—Breach of Warranty.**—A policy of insurance covering a house and the personal property therein is entire and indivisible, and a breach of warranty which will avoid the policy as to one class of property will also avoid it as to the other.

**SAME.—Divisible Risk.**—Where a policy of insurance covers two or more buildings, which are so situated that the risk on each is separate and distinct, the policy is a divisible one, and breaches of warranty affect-

119	291
121	529
121	578
123	174
123	193
119	291
127	543
119	291
122	452
133	109
119	291
147	550
119	291
165	323

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ing the risk on one building constitute no defence to an action for the destruction of another.

**SAME.**—*Condition of Property.*—*Encumbrance.*—*Value.*—Warranties that an insured house is twelve years old, when it is thirty, that the encumbrance on the land upon which the house is situate is \$1,000, when it is \$2,200, with a large accumulation of interest, and that the house is worth \$400, when it is worth only \$250, will avoid the policy.

**SAME.**—*Agent.*—*Filling Blanks in Application.*—*Scope of Authority.*—An agent, authorized to take applications for insurance, acts within the scope of his authority when he fills out a blank application, and if, by his fault or negligence, it contains misstatements not authorized by the instructions of the applicant, the wrong will be imputed to the company.

**SAME.**—*Writing False Answers.*—*Estoppel of Company.*—Where an agent, authorized by his company to take applications for insurance, writes false answers to questions contained in the application, without the knowledge and contrary to the directions of the applicant, who makes true answers to such questions, the company is estopped by the answers thus written by its agent.

**SAME.**—*Value of Property.*—*Honest Judgment of Insured.*—Questions of value, when applied to real estate, are from necessity matters of mere opinion, and if the applicant for insurance gives the value of the property according to his honest judgment and opinion, there is no breach of warranty.

**SAME.**—*Notice of Loss.*—*Unreasonable Delay.*—*Evidence.*—A provision in a policy requiring notice of loss to be given forthwith is void under section 3770, R. S. 1881, yet the assured is required under the policy to give notice within a reasonable time. An unexplained delay of fifty days is unreasonable, and the notice may be excluded from evidence.

**SAME.**—*Diligence.*—*When Question for Jury and When for Court.*—Where the facts constituting diligence in giving notice are in dispute, what is a reasonable time is a question for the jury, under proper instructions; but where the facts are not in dispute, the question is for the court.

From the Knox Circuit Court.

*W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellant.*

*J. McCabe and E. F. McCabe, for appellee.*

**COFFEY, J.**—This is an action by the appellant against the appellee upon an insurance policy. The complaint alleges that, on the 15th day of June, 1886, the plaintiff's residence, in Knox county, together with his household goods therein, covered by the policy in suit, was destroyed by fire.



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The appellee filed an answer in eleven paragraphs, the first being a denial.

The second paragraph avers that the policy of insurance was issued upon the written application of the appellant; that in said application the appellant represented and warranted that the house named in the complaint was only twelve years old, when in truth and in fact it was thirty years old, by reason of which breach of warranty said policy is void.

The third paragraph of the answer avers that the policy in suit was issued upon the written application of the appellant, and that in said application he represented and warranted that there was only an encumbrance of \$1,000 on the land upon which the house named in the complaint was located, when in truth and in fact there was a mortgage on said land for the sum of \$2,200, and \$770 interest thereon, by reason of which breach of warranty said policy is void.

The fourth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application he represented and warranted that the house named in the complaint was of the then cash value of \$400, when in truth and in fact it was of the then cash value of \$250 only, by reason of which breach of warranty said policy is void.

The fifth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application he stated and warranted that another dwelling-house situated on the land described in the policy was of the value of \$300, when in truth and in fact it was of the value of \$100 only, by reason of which breach of warranty the policy was void.

The sixth paragraph avers that the policy in suit was issued upon the written application of the appellant, and that in said application the said appellant stated and warranted that the barn described in said policy of insurance was of the value of \$500, when in truth and in fact it was

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of the value of \$300 only, by reason of which breach of warranty said policy is void.

The seventh paragraph avers that the policy in suit was issued on the written application of the appellant, and that in said application the appellant warranted and stated that the land upon which the house named in the complaint was located was of the value of \$35 per acre, when in truth and in fact it was of the value of \$25 only, by reason of which breach of warranty said policy was void.

The eighth paragraph avers that one of the conditions of the policy in suit is, that if the buildings therein named shall be or become vacant during the existence of the policy, the same should become void; that in violation of said condition, dwelling-house No. 2, named in said policy, did become vacant after the execution of said policy, and so remained vacant up to the time of the destruction of the house named in the complaint, by reason of which said policy became void.

The ninth paragraph avers that certain personal property covered by the policy in suit, consisting of stock and farming implements, was mortgaged in violation of the conditions of said policy, by reason of which said policy became void.

It is averred in the tenth paragraph of the answer that, in violation of the conditions of the policy in suit, the appellant mortgaged certain of the personal property insured thereby, consisting of corn and hay, by reason of which said policy became void.

It is averred in the eleventh paragraph of the answer that one of the conditions in the policy in suit is, that if the property insured shall become mortgaged or encumbered during the existence of the policy, the same shall become void; that, on the 18th day of February, 1885, one William J. Hebberd recovered a judgment in the Knox Circuit Court, which became a lien on the house named in the complaint, by reason of which said policy became void.

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The appellant filed a several demurrer to each of the above affirmative answers, which was sustained as to the eleventh and overruled as to the others, to which he excepted.

The appellant then filed a reply in three paragraphs, the first consisting of the general denial. The court sustained a demurrer to the second and third paragraphs of the reply, and the appellant excepted. A trial of the cause resulted in a verdict and judgment for the appellee. The appellant assigns as error :

1st. That the court below erred in overruling separately and severally the demurrers to each of the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the answer to the complaint.

2d. That said court erred in sustaining the demurrers of the appellee to each of the second and third paragraphs of the reply to the answer.

3d. That said court erred in overruling the motion for a new trial.

The second, third and fourth paragraphs of the answer aver breaches of warranty contained in the application for the insurance of the house named in the complaint. These warranties are in relation to the condition of the property destroyed, and where there is a substantial breach of such warranties the policy is void. The warranties affecting the risk on the house also affected the personal property contained therein. As to the house and its contents, the policy is an entirety, and indivisible. *Phenix Ins. Co. v. Pickel, ante*, p. 155.

In our opinion these answers constitute a good defence to the cause of action set up in the complaint. This policy was involved in the case of *Phenix Ins. Co. v. Pickel, supra*. In that case it was held that the policy was several as to the different buildings therein named, and that a breach of the warranty as to the one did not affect the other.

The fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the answer aver breaches of warranties and covenants having no relation to the building and its contents for

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the destruction of which this suit is prosecuted. In our opinion these several answers constitute no defence to the plaintiff's complaint, and that the circuit court, therefore, erred in overruling the demurrers thereto.

The second paragraph of the reply is addressed to the third paragraph of the answer, and avers that the application therein set out was written on a printed blank furnished by the appellee, which had printed questions thereon, with blanks for answers thereto; that said application was made by him, at the request of the appellee, through its general agent, S. R. Hopkins, who took the same by reading the questions printed thereon, and writing down the answers of the appellant thereto; that in answer to the question in said application in relation to the real estate on which the buildings insured are situate, "Is it incumbered in any way? If so, when is mortgage due, and for how much?" the appellant truly answered, "Yes; there is a mortgage on it for \$2,200, executed to the General Life Insurance Company, of Hartford, Connecticut," but the said Hopkins falsely and fraudulently, and for the purpose of securing his commission for procuring said contract of insurance, which the appellee promised to pay him, wrote said answer as it appears written in said application, to wit: "Mortgaged, \$1,000;" that thereafter, and as soon as said answers and questions were completed, said Hopkins read the said application over to the appellant, and read the same as if the appellant's proper answer, as above, had been written therein; that the appellant was fifty years of age and unable to read, and relying upon the promise of said agent to write his answers correctly, and read the same correctly to him when written, which promise said Hopkins made to him, signed the same, after which said Hopkins transmitted it to appellee, who accepted it with full knowledge of the false and fraudulent acts of the said Hopkins, as aforesaid, and, with full knowledge thereof, afterwards executed to the appellant the policy sued on and received from him the premium thereon, to wit,

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the sum of thirty-five dollars; that the appellee knew at the time it issued the policy in suit that said property was encumbered by the aforesaid mortgage of \$2,200, and did not rely on the statements and warranty contained in said application that the same was encumbered only to the extent of \$1,000, but knowing the fact issued said policy nevertheless.

The third paragraph of the reply is addressed to the fourth, fifth, sixth and seventh paragraphs of the answer, and avers that in estimating the value of the buildings and real estate on which they are situate in his said application, he answered the questions in relation thereto, as set forth in each of said paragraphs of answer, honestly and truthfully, according to his best judgment of the value of each, without any intention to deceive or defraud the appellee, but with the honest intention of informing the appellee of their true value according to his judgment; that the values thereto affixed by him were their true values at that time according to his best judgment; that appellee accepted said application, and issued to appellant said policy, with the understanding and agreement that the said estimates of value were by the appellant founded upon his best judgment as aforesaid.

An agent, authorized to take applications for insurance, should be deemed to be acting within the scope of his authority where he fills up the blank application of insurance; and if, by his fault or negligence, it contains a misstatement not authorized by the instructions of the party who signed it, the wrong should be imputed to the company, and not to the assured. *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. And when the agent thus authorized by his company to take applications for insurance, without the knowledge of the applicant, writes false answers to questions contained in the application contrary to the directions of the applicant, who makes true answers to such questions, the company will be estopped by the answers thus written by its agent. *Plumb v. Cattaraugus County M. Ins. Co.*, 18 N. Y. 392; *Insurance Co. v. Wilkinson*, 13 Wallace, 222; *Insurance Co. v. Ma-*

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*hone*, 21 Wallace, 152; *New Jersey M. L. Ins. Co. v. Baker*, 94 U. S. 610.

In this case it is averred in the reply, and admitted by the demurrer, that the appellant gave the true amount of encumbrance to the appellee's agent; that said agent wrote a false answer to the question contained in the application relating to encumbrances; that applicant could not read; that the agent falsely read the application to him, having agreed to read it correctly; that the appellee had notice of the fraud perpetrated upon the appellant, and with such knowledge issued to him the policy in suit and accepted the premium. We think that the appellee should not, under the circumstances set up in this reply, be permitted to assert now, for the purpose of avoiding the policy in suit, that the answer in said application is not true. In our opinion the second paragraph of the reply is good, and the court erred in sustaining a demurrer thereto.

We think the court also erred in sustaining a demurrer to the third paragraph of the reply. Questions of value, when applied to property of the kind covered by this policy, are, from necessity, matters of mere opinion.

Wood on Fire Insurance, pp. 568-9, in discussing the question now under consideration, says: "How is value determined? Is it not a matter of judgment and opinion wholly, except, it may be, in special instances? How is the value of real estate to be estimated? What is the standard by which to ascertain the value of a building? Is it what this man or that says it is worth? Is it what it would cost to build another of the same style and materials? The ascertainment of any of these facts is a mere matter of judgment. Has not the assured the same right to exercise his judgment, if he exercises it honestly, that his neighbors on the jury have? When the insurers propound this inquiry, upon what basis and by what standard is it to be presumed they expect the insured to estimate the value? Is it reasonable to suppose that they expect him to estimate the value

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of the materials composing it, the cost of labor to build it, or rather to give his *honest judgment and opinion upon the question?* Suppose the question in the application to be, 'What, in your honest judgment and opinion, is the value of the property?' Would it not be held that, in order to avoid the policy, the insurer must show that the value was not given according to the honest judgment and opinion of the insured? Most certainly. And it is difficult to conceive how the introduction of the words 'judgment or opinion' into the question can affect the right of the parties at all, for, in nearly all instances, the question of value is well known to be a mere matter of opinion. Particularly is this so as to buildings and real estate generally, and all the insurer expects or has the right to expect in answer to a question of the value thereof is simply the honest judgment and opinion of the assured, and it is absurd to hold the assured responsible for an error of judgment *honestly* made, simply because his neighbors differ with him in that respect. A doctrine that held the insurer up to a strictly exact valuation would be extremely unjust, and would result in vitiating one-half the policies issued, for, under the rule, the difference of *one cent* is as disastrous as a difference of a large amount."

We are of the opinion that there may be a warranty of value, but such warranty amounts to nothing more than that the value stated is the honest judgment and opinion of the party making such valuation. From the very nature of such a warranty it must be so understood by the insurer when it is accepted. It follows from this that if the values attached to property covered by the policy in suit are the result of the honest judgment and opinion of the assured, there is no breach of the warranty, and the third paragraph of the reply is, therefore, good.

The loss in this case occurred on the 15th day of June, 1886, and the notice of such loss was mailed to the appellee on the 4th day of August thereafter, a period of fifty days.

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The policy in suit contains a provision that in case of loss the insured shall forthwith give notice thereof to the company. After proof of mailing the notice to the appellee's agent at Chicago, the appellant, without giving any excuse for the delay in mailing such notice, offered in evidence a copy thereof. Upon objection made by the appellee, the court refused to allow such copy to be read in evidence.

It is contended by the appellant that under the provisions of section 3770, R. S. 1881, the condition in said policy is void, and that, therefore, the court erred in refusing to allow said notice to be read in evidence.

Section 3770, R. S. 1881, prohibits foreign insurance companies, doing business in this State, from inserting in their policies of insurance a condition requiring the insured to give notice of loss forthwith, or within a period of less than five days.

In the case of *Insurance Co. v. Brim*, 111 Ind. 281, it was held that where such a condition was inserted the same was void, but nevertheless, under a policy containing such a condition, the assured was required to give notice within a reasonable time.

Where the facts constituting diligence are in dispute, what is a reasonable time is a question for the jury, under proper instructions of the court, but where the facts are not in dispute, what constitutes a reasonable time is a question of law for the court.

In the case of *Railway Passenger Assurance Co. v. Burwell*, 44 Ind. 460, it was held, under the circumstances in that case, that six days was not a reasonable time; in the case of *Inman v. Western Fire Ins. Co.*, 12 Wend. (N. Y.) 452, thirty-eight days was held to be unreasonable; in *Whitehurst v. North Carolina Mutual Ins. Co.*, 7 Jones L. (N. C.) 433, twenty days was held not to be reasonable; and in the case of *Trask v. State Fire, etc., Ins. Co.*, 29 Pa. St. 198, eleven days was held not to be a reasonable time.

Under these authorities we are constrained to hold that a



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delay of fifty days in this case, unexplained, was an unreasonable delay, and that the court did not err in refusing to allow the appellant to read the notice in evidence.

The judgment of the court below is reversed, with instructions to sustain the demurrer to the fifth, sixth, seventh, eighth, ninth and tenth paragraphs of the answer, and to overrule the demurrer to the second and third paragraphs of the reply, and for further proceedings not inconsistent with this opinion.

Filed June 6, 1889.

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No. 14,705.

LINDSAY v. GLASS.

**CONTRACT.—For Care and Support.—Specific Performance.**—A contract for care and support is not one the specific performance of which will be enforced, but if repudiated the remedy is an action for damages.

**SAME.—Transfer of Property.—Condition Subsequent.**—While such a contract remains executory, a transfer of property thereunder will be treated as having been made upon the condition subsequent that the promise to furnish care and support shall be fully and fairly performed.

**SAME.—Rescission.—Reclamation of Property.**—Until the contract is fully performed on both sides, it is liable to be rescinded and the property transferred thereunder reclaimed, leaving the parties to their redress for what may have been furnished.

**SAME.—Contract for Support Imposes Personal Obligation.**—A transfer of property in consideration of an agreement to furnish the grantor a home, with care and support, imposes a personal obligation upon the grantee, which he can not evade without the consent of the other party concerned.

From the Bartholomew Circuit Court.

G. W. Cooper and C. B. Cooper, for appellant.

F. T. Hord, M. D. Emig and R. W. Harrison, for appellee.

119	301
123	70
119	301
128	135
119	301
138	361
119	301
145	345

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MITCHELL, J.—Eliza Glass brought this action against James Lindsay to recover certain sums of money derived from her deceased husband's estate, which she charges that the defendant received and appropriated to his own use.

There is no controversy but that the defendant received \$2,060 of the plaintiff's money from various sources, but he denies her right to recover, because he says that, in the month of November, 1884, the plaintiff being very old, feeble, and totally blind, and without a home, agreed with the defendant, who is her brother, to give him all her property in consideration of his agreement to furnish her a good home, and support and take care of her during the remainder of her natural life. He asserts that, in compliance with his agreement, he kept the plaintiff from the date above mentioned until in the month of February, 1887, at which time she left his house, and has not since returned, although he has been all the time and still is ready and willing to perform his part of the contract.

There was a verdict and judgment for the plaintiff below for \$1,502.12, and the sole question here relates to the propriety of the ruling of the court in overruling the defendant's motion for a new trial.

It is well to observe that contracts made by persons in the helplessness of misfortune and distress, or under the infirmity and decrepitude of old age, through which a claim is asserted to their property in consideration of an unexecuted promise of support and maintenance, are peculiar in their character and incidents. One who is aged and infirm, without a home, and in a state of dependence upon another, to whom property is conveyed or transferred in consideration of an agreement for support, is scarcely in a situation to exercise the care for his own interest and protection that usually characterizes the conduct of persons in making ordinary contracts. Such contracts, involving continuing care and personal service, and requiring for their proper execution that the parties concerned should occupy toward each other

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relations of confidence and esteem, can not be specifically enforced while they remain executory. *Ikerd v. Beavers*, 106 Ind. 483.

To compel one to accept the alternative of receiving support under an improvident contract, or to become a subject of charity, might often result in great oppression. Such contracts belong to a class the specific enforcement of which courts of chancery do not undertake. Parties who enter into such agreements must rely upon a continuance of the confidence and esteem which induced the arrangement in the beginning, or take their chances to recover damages if the contract is repudiated.

For the protection of persons who thus dispose of their property, courts are inclined to treat the transfer or conveyance, so long as the contract for support remains executory, as having been made upon the condition subsequent that the promise to furnish care and maintenance shall be fully and fairly performed. *Richter v. Richter*, 111 Ind. 456; *Bogie v. Bogie*, 41 Wis. 209; *Rowell v. Jewett*, 69 Me. 293; *Eastman v. Batchelder*, 36 N. H. 141 (72 Am. Dec. 295); *Bethlehem v. Annis*, 40 N. H. 34 (77 Am. Dec. 700); *Wilder v. Whittemore*, 15 Mass. 262; *Thayer v. Richards*, 19 Pick. 398. Until the contract is fully performed on both sides, it is liable to be rescinded and the property reclaimed, leaving the parties to their remedies, respectively, for what may have been furnished under the contract.

In the present case the plaintiff persistently denied that she ever made any contract with the appellant by which he became entitled to her property in consideration of a promise to support her. Besides, if there was a contract, such as the appellant claims, there was evidence which tended to show that he was not fairly carrying it out, and that the plaintiff was left in the family of a stranger, where she was receiving care at the defendant's expense, until her sisters took her in charge. The finding of the jury was, therefore, fully justified upon either hypothesis.

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A transfer of property in consideration of an agreement to furnish the grantor a home, with care and support, imposes a personal obligation upon the grantee, or transferee, which he can not evade without the consent of the other party concerned. One who accepts the property of a sister, or parent, and agrees, in consideration thereof, to furnish a home, with suitable maintenance and support, does not perform his contract fairly and according to its spirit by simply furnishing shelter and subsistence. A home is something in addition to a roof over one's head, with food and drink supplied by strangers.

The appellant complains because certain letters received by him, and requesting that he come and assist the plaintiff in settling some business transactions, were excluded from the jury. The letters were irrelevant to any matters in issue. So, also, were certain questions relating to the treatment received by the plaintiff from her sisters before she came to live with the appellant. There was no error in permitting the plaintiff to prove that the appellant said he wanted to sell her land because he needed the money.

We find no instructions in the record. Hence there is no question before us as to the proper rate of interest to be charged in such a case. We must presume that the court instructed the jury properly upon the subject of interest.

Upon the view of the case most favorable to the appellant, he was entitled to nothing more than to be reimbursed for the actual value of the support and maintenance furnished, and for expenses incurred in and about the plaintiff's business. So far as we can discover, this was the rule applied.

The judgment is affirmed, with costs.

Filed June 6, 1889.

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Miller, Administrator, v. Wohlford *et al.*

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No. 14,582. .

**MILLER, ADMINISTRATOR, v. WOHLFORD ET AL.**

**WILL.—Widow.—Emblements.**—A testator's will provided that his wife should receive during her life one-third of all grain raised on certain land, the same to be delivered to her in the county at any point she might designate, as soon as it should be harvested and prepared for the market according to good husbandry. The title to the land and the right of possession were vested in other persons. The provision for the widow's benefit was made a charge upon the land. She regularly received from the occupants of the land one-third of the grain harvested up to the time of her death, which occurred in the month of May, several years after the testator's death. Her administrator now seeks to recover the value of one-third of the crops planted prior to her death but not harvested and prepared for the market until after that time.

**Held,** that as the time for harvesting and delivering the grain, as provided in the will, had not arrived at the time of the widow's death, there was nothing to go to her legal representatives, and that the action can not be maintained.

From the Elkhart Circuit Court.

*W. H. Vesey and C. W. Miller*, for appellant.

*L. Wanner*, for appellees.

**BERKSHIRE, J.**—The appellant, administrator, with the will annexed, of the widow, filed his complaint to recover her share of the crops growing on certain real estate at the time of her death.

To this complaint appellees each demurred for want of facts. Their demurrer was sustained by the court, and appellant refusing to plead over, judgment was rendered against him for costs. To this ruling of the court appellant excepted and prayed an appeal.

The only question for the consideration of this court involves the sufficiency of appellant's complaint. The complaint is in words and figures following :

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“ The plaintiff, Thomas Miller, administrator with the will annexed of Sarah Wohlford, deceased, complains of the defendants and says that long before the decease of the said Sarah Wohlford, to wit; on the — day of May, 1881, her husband, one Samuel Wohlford, departed this life testate, leaving his last will and testament, which was immediately thereafter duly admitted for probate and is now on record in Will Record No. 3, on pages 24 to 40 inclusive, of the public records of said county, a copy of which is filed herewith, made a part hereof and marked ‘ Exhibit A ’; that according to the terms of said last will and testament, her husband, the said Samuel, devised and bequeathed to her, the said Sarah, one-third interest in and to all the grain which should be raised for and during the period of her natural life, by any and all persons who should during said period come into the possession or occupancy thereof, of the following described real estate situate in said county and State, to wit: The southwest quarter ( $\frac{1}{4}$ ) of section twenty-eight (28), in township thirty-seven (37) north, range six (6) east, containing one hundred and sixty acres, which said tract was, according to the terms of said last will and testament, devised to the defendant Reuben Wohlford, subject to the said right of said Sarah as aforesaid; and also the northwest quarter ( $\frac{1}{4}$ ) of said section, excepting thirty (30) acres out of the northeast corner thereof, theretofore sold to one David Logan and one Israel Wolfe, and also excepting twenty (20) acres theretofore sold to one George A. Snyder, leaving about one hundred and ten acres, which was, by the terms of said last will and testament, devised to the children of the testator’s son, Samuel Wohlford, Jr., deceased, being the other defendants herein, subject to the rights of said Sarah as above set forth; that according to the terms of said last will and testament, any and all persons occupying, possessing or farming said real estate during the lifetime of the said Sarah, held the same subject to her estate as aforesaid, and not otherwise, and subject to the right of said Sarah to have such one-third part

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of all the grain which should be raised upon said real estate as aforesaid, delivered to her at any point in said county and State she should designate, by the person or persons so occupying or having possession thereof, free of expense to her, as soon as the same should be harvested and prepared for market according to good husbandry; and to the end that said Sarah should receive one-third part of all of said grain, and the delivery thereof be secured to her as aforesaid, her said right to one-third part of such grain and the delivery of the same to her as aforesaid was, according to the terms of said last will and testament, made a charge upon the whole of said land and a continuing lien thereon, to be in no manner divested; that the said Sarah elected and took, under and by virtue of said last will and testament, the property therein devised and bequeathed to her, and the defendants duly entered upon said real estate and took possession of the same, according to their respective interests, under and by virtue of said last will and testament as therein set forth, and the defendants turned over to the said Sarah her share of said grain, as above set forth, from the time of the death of said testator to a short time prior to the death of said Sarah. But the plaintiff says that the said Sarah departed this life on the — day of May, 1887, and that prior to her decease the defendants, occupying the said premises as above set forth, sowed a large acreage of wheat, corn and oats on said real estate, one-third of which belonged to the said Sarah as aforesaid; that said wheat, corn and oats were, after the death of said Sarah, duly gathered, harvested and threshed and prepared for market by the defendants herein, according to said last will and testament; that said wheat, corn and oats, as raised by the defendants and prepared for market according to the terms thereof, amounted to one thousand four hundred and twenty-three bushels of wheat, five hundred bushels of corn, and six hundred and eighteen bushels of oats, one-third of which belonged to the estate of said Sarah as aforesaid; that said wheat at said time was and still is of the

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value of seventy-two cents per bushel, and said corn was and still is of the value of fifty cents per bushel, and said oats of the value of thirty-two cents per bushel; that the said Sarah, at the time of her decease, save and except her right in and to said grain as above set forth, was entirely destitute, and in consequence thereof plaintiff, as administrator with the will annexed of her estate, has been wholly unable to pay any of the court costs in her estate, her funeral expenses, expenses of her last sickness, and many other just claims against her estate, all of which are long past due and wholly unpaid; that the plaintiff, administrator with the will annexed of the said Sarah, in such capacity, has often, prior to the bringing of this suit, demanded of the defendants the delivery of said grain belonging to her estate according to the terms of said last will and testament, but the defendants refused, and although said grain was prepared for market long before the bringing of this suit, according to the terms thereof, the defendants still refuse so to do, and assert to this plaintiff that the estate of said Sarah has no interest in said grain. Plaintiff avers that the defendants Delilah P. Wohlford, Catherine A. Wohlford, George W. Wohlford and Lewis H. Wohlford have not yet attained the age of majority, and asks that a guardian *ad litem* be appointed and make defence hereto according to their respective interests. Wherefore plaintiff, as administrator with the will annexed of the estate of Sarah Wohlford, deceased, demands judgment in the sum of eight hundred dollars, for the enforcement of said lien, and the sale of said real estate for the satisfaction thereof, and all other proper relief."

This is an action to recover the value of emblements to which the appellant claims he was entitled as the legal representative of his decedent.

In order to entitle one claiming to be a tenant, or his legal representative, to emblements, the following facts must appear: 1. The existence of a tenancy of uncertain duration. 2. A termination of the tenancy by the act of God or by the



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act of the lessor. 3. That the crop was planted by the tenant, or some one claiming under him, during his right of occupancy. Washburn on Real Property, vol. 1, p. 140, 5th ed., says: "But it is essential to the claim of emblements, at the common law, that the crop should have been actually planted during the life and occupancy of the tenant. No degree of preparation of the ground will give to one the fruits of seed planted by another after the determination of his tenancy. In order to entitle a tenant or his executors to emblements, the estate which he has must, in the first place, be uncertain in its duration." On page 141 we find the following: "So, in the second place, the tenancy must be determined by the act of God, as by death of the tenant, or the act of the lessor in expelling him or terminating his lease." On page 143 it is said: "To avail himself of the emblements, it is obvious that the tenant or his representative must have some right of entry or occupancy of the land itself; and if the tenancy is determined by death or otherwise soon after the planting of a crop, this right may of necessity be continued for some months. The extent of this right may be stated to be this: He may enter upon the land, cultivate the crop if a growing one, cut and harvest it when fit, and if interfered with in the reasonable exercise of these privileges by the landlord or reversioner, or if the crop be injured by him, he may have an action for the same." Tiedeman Real Property, section 70, says: "Emblements are the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates." In the same section this author further says: "As an incident to the right of emblements, the tenant or his representatives have a right of entry upon the land, after the termination of the tenancy, for the purpose of attending to the crop while growing, and for harvesting it when ripe. The right of ingress and egress, however, is limited to what is necessary for these purposes." In section 71 we find the following: "In order that a

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tenant may claim emblements, he must show that *his estate* [the italics are our own] was one of uncertain duration." In Taylor's Landlord and Tenant, section 534 (8th ed.), the author says: "A tenant for life, or his legal representatives and under-tenants, as well as a tenant from year to year, or at will, is entitled to emblements; which means a right to take and carry away, within a reasonable time after his tenancy has ended, such annual productions of the soil as are raised by his labor. \* \* \* This privilege is allowed to tenants for life, at will, or from year to year, and even to tenants for years, whose estate may be terminated by some uncertain event, because of the uncertain nature of their estates, and lest they should be deterred from the proper cultivation of their lands. And the general rule upon this subject is, that if the term is so uncertain, that the tenant at the time he sows his crop can not know that his tenancy will continue, until he shall have reaped it, he will be entitled to the crop as emblements."

Where a tenant abandons possession and leaves the immature crop, the landlord may enter and appropriate it without legal process. *Sharp v. Kinsman*, 18 S. C. 108. In *Stewart v. Doughty*, 9 Johns. 110, the court says: "The preparation of the ground for the reception of seed is not necessarily a substitute for the right to the emblements, for it may apply to clearing and manuring and ploughing ground, and these acts may have taken place long before seed-time. The common law has established a distinction in respect to this very subject of emblements, between the right to emblements and the costs of ploughing and manuring the ground, so that the determination of an estate at will would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground." See *Price v. Pickett*, 21 Ala. 741; *Humphries v. Humphries*, 3 Ired. L. 362; *Hawkins v. Skeggs*, 10 Humph. 31.

In the case of *Stout v. Dunning*, 72 Ind. 343, referred to

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by counsel for appellant, it is held that, by the terms of the conveyance, James B. Stout was entitled to the possession of the real estate; and in the case of *Davidson v. Koehler*, 76 Ind. 398, cited, the widow of the testator was held to be a life tenant and entitled to the occupancy of the real estate. The will in express terms gave to her the right of occupancy. In *Lindsey v. Lindsey*, 45 Ind. 553, the will gave to the widow the possession of the real estate during life. Under the will there can be no question but that she was a life tenant. We think the principle here involved is covered by what was ruled in the case of *Watson v. Penn*, 108 Ind. 21. It was held in that case that where the testator by his will gave certain real estate to his wife, which at the time was occupied by a tenant, and she died before the time came for the payment of the rent, it passed to the reversioner and not to the representatives of the life tenant.

There is no doubt, we think, as to the correctness of the conclusion reached in the cases of *Thompson v. Schenck*, 16 Ind. 194, and *Rumsey v. Durham*, 5 Ind. 71, that a devise of the rents and profits of land carries the legal title, but the difficulty in the way of the appellant is that the rents and profits did not pass by the will to his decedent. We can imagine no theory upon which this action can be maintained.

The decedent was in no sense a tenant of the real estate on which was raised the emblements sued for. Under her husband's will she had no estate in the land, and no right to the possession. She did not plant the crops, nor did any one claiming to hold as a sub-lessee under her do so.

The will of the testator vested the title at once, upon his death, in the appellees, with the immediate right of possession, and they planted and cultivated the crops. By the will the one-third part of all the grain raised upon the real estate was, during the natural life of the decedent (widow), given to her during her natural life, to be delivered yearly in the bushel, at any point that might be designated by her in Elkhart county, as soon as the same should be harvested

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or gathered, according to good husbandry. By the provision thus made for her the decedent was not entitled to the crops which she was to receive until they were harvested ; until then they were not due to her. Until delivered to her the title to the emblements remained in the tenant in possession, who planted the same. The provision as made was simply a provision for the decedent's support, and by the will of her husband, whereby the provision was made, its performance was secured as a lien upon the real estate. Had the tenant in possession refused to deliver the one-third of the grain, the decedent could have maintained no action for its recovery, nor had she such an interest in it as to render it subject to execution as against her. The most that can be said is, that the tenant in possession could satisfy the provisions of the will made for the support of the decedent by delivering to her the one-third of the grain raised yearly, as therein provided, and upon a failure so to do she had a right of action for the value, secured by an enforceable lien against the real estate. The time for harvesting and delivering the emblements, as in the will provided, not having arrived at her death, there was nothing to go to her legal representatives.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed June 6, 1889.

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Cooper v. Smith.

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No. 13,420.

## COOPER v. SMITH.

**PLEADING.—Answer in Confession and Avoidance.**—An answer in confession and avoidance is not bad for failing to confess the cause of action precisely as it is alleged; it is sufficient if it confess a *prima facie* cause of action.

**BANK.—Suspension of.—Deposit of Another's Money in Depositor's Name.—Liability.**—One who collects money for another and deposits it in his own name in a bank believed to be solvent, is relieved from liability for loss caused by the failure of the bank if the person entitled to the money, with knowledge of the facts, receives from the depositor the certificate of deposit in satisfaction of the latter's obligation.

**SAME.—Deposit by Gratuitous Collector.—Ratification.**—Where one gratuitously collects money for another and in good faith deposits it in his own name in a bank of good repute for solvency, and the person entitled to the money receives the certificate of deposit and ratifies the depositor's acts, with knowledge of all the facts, the latter is not liable for loss caused by the suspension of the bank.

**SAME.—Evidence.—Solvency of Bank.—Separation of Accounts.**—In such a case, evidence as to the business and solvency of the bank, and that at the time of the deposit the depositor also deposited money of his own, the two accounts being kept separate, was proper.

**INSTRUCTIONS TO JURY.—Detached Clause.—Attack Upon.**—An attack upon a detached clause of an instruction will only avail when such clause makes the entire instruction erroneous.

From the Shelby Circuit Court.

J. B. McFadden, for appellant.

T. B. Adams and G. W. Wright, for appellee.

ELLIOTT, C. J.—The appellant alleges in his complaint that he delivered to the appellee for collection a check given by the pension agent of the United States, at Indianapolis; that the appellee undertook to collect it and return the proceeds to the appellant; that he did collect the amount of the check, but, instead of returning the amount collected to the appellant, deposited it in Fletcher & Sharpe's bank, at Indianapolis, in his own name and to his own credit, and

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that the bank was then and now is totally insolvent. The third paragraph of the answer admits the receipt and collection of the check, and the deposit of the proceeds in Fletcher & Sharpe's bank; avers that the bank was doing a regular banking business, and that it was then a bank of good repute for solvency and prompt payment of its creditors. This paragraph also avers that the appellee did take a certificate of deposit in his own name, but that he transferred the certificate to the appellant in good faith; that the appellant received it, with full knowledge of all the facts, in full discharge and satisfaction of the obligation incurred by the appellee in receiving the check, and that the appellee received the check and collected the money without the payment or promise of compensation. The admissions of the fourth paragraph of the answer are substantially the same as those of the third, and so are the averments concerning the reputation of the bank. It is averred that the appellant received the certificate of deposit from the appellee with full knowledge of the facts, and approved his acts; that the appellant did not at any time offer to return the certificate of deposit to the appellee, but retained it and finally delivered it to the receiver of the bank, and received the dividends declared due the bank's creditors. The fifth paragraph of the answer contains the same admissions as the third and fourth, and avers that the appellee received and agreed to collect the check as a gratuitous service; that he was requested by the appellant to deposit the proceeds; that he did deposit them in Fletcher & Sharpe's bank; that the bank's reputation for solvency was good; that he delivered and transferred the certificate of deposit to the appellant, who accepted it in full satisfaction of the appellee's obligation.

The answers are sufficient. They confess and avoid the cause of action stated in the complaint. The counsel for appellant is in error in asserting that, to be good, an answer in confession and avoidance must confess the cause of action precisely as it is alleged, for even under the strict rules of

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the common law it was sufficient if the plea gave color to the cause of action stated in the declaration. Stephen Plead. (9th Am. ed.) 202. The answers confess a *prima facie* cause of action, and this obviates the appellant's objection even if we hold that the strict rule of the common law governs the case.

The answers avoid, as well as confess, for they show that the appellant received the certificate of deposit with knowledge of all the facts, in full satisfaction of the appellee's obligation. This fact alone relieves the appellee from liability. It would be manifestly unjust to compel the defendant to pay a claim where the plaintiff has accepted and retained a certificate of deposit issued and received under such circumstances as those stated in the answer.

The second paragraph of the reply is addressed to the third, fourth and fifth paragraphs of the answer. It admits the receipt of the certificate of deposit from the appellee, but avers that when it was delivered the appellant was informed by the appellee that he had collected and deposited the money ; that on the evening after the delivery of the certificate, the appellee informed the appellant that the bank had suspended and requested him to keep the certificate ; that in compliance with the direction of the appellee, he did retain the certificate until the 4th day of September, 1884, when he delivered it to the appellee and has not seen it since ; that on the 5th day of that month, he received from the appellee a paper signed by the receiver of the bank, and subsequently, by direction of the appellee, received dividends thereon. It is obvious that this reply is bad. It does not avoid the material averments of any one of the paragraphs of the answer, much less of all, as it professes to do. The averment that the certificate was received in satisfaction of the obligation imposed upon the appellee by his gratuitous act is confessed, but not avoided, and this, of itself, is enough to condemn the pleading. But there are other material allegations in the answers which make them good and the reply bad,

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but we deem it only necessary to mention these : The services were rendered without compensation, the reputation of the bank was good, the appellee acted in good faith, and the appellant ratified his acts with full knowledge of all the facts.

Evidence of the business and solvency of Fletcher & Sharpe's bank was competent.

It was proper to permit the appellee to prove that at the time he deposited the proceeds of the appellant's check, he deposited money of his own, and it was proper to allow him to prove that he made the deposits separately.

A clause is taken from the second instruction given by the court and assailed as erroneous, but an assault upon detached clauses is seldom successful, for an instruction is not to be judged in detached clauses, but as an entirety. Where a clause makes the entire instruction erroneous, then such an attack as this will prevail, but it can not prevail here, for taking the instruction as a whole it is quite as favorable to the appellant as he had a right to ask.

We can not disturb the verdict on the evidence.

Judgment affirmed.

Filed June 7, 1889.

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No. 13,649.

HANNA ET AL. v. THE TERRE HAUTE AND INDIANAPOLIS  
RAILROAD COMPANY.

**VERDICT.**—*For Defendant.*—*When Court May Direct.*—The trial court may direct a verdict for the defendant when the essential facts showing that the plaintiff has no right to recover are not controverted, or where the plaintiff's evidence, with its legitimate inferences, is insufficient to sustain a verdict in his favor.



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**RAILROAD.—Public Crossing.—Animals.—Contributory Negligence of Owner.—**

Where the owner of animals permits them to run at large, unattended, in the vicinity of a railroad crossing, he is guilty of contributory negligence which will defeat an action for their negligent killing by a passing train, notwithstanding an order of the board of county commissioners allowing cattle to run at large.

**SAME.—When Railroad Company Not Negligent.—Wilful Injury.—**If the statutory signals are given, and reasonable efforts made, in the customary manner, to frighten away animals which are seen upon a public crossing, the railroad company has done all it is required to do, so far as the owner of the animals is concerned. To make it liable, an actual or constructive intent to commit the injury must be alleged and proved.

From the Montgomery Circuit Court.

*N. P. H. Proctor*, for appellants.

*J. G. Williams, W. T. Brush and R. B. F. Peirce*, for appellee.

**MITCHELL, J.**—Hanna and Goslin sued the Terre Haute and Indianapolis Railroad Company to recover the value of two cows, alleged to have been injured by the company's cars. The complaint is in two paragraphs; the first counts upon the statutory right of action, the charge being that the animals entered upon the railroad track and were injured at a point where the track was not securely fenced. The second paragraph is a common law action, for negligently injuring the plaintiff's animals. While there are some averments which render uncertain the theory upon which the pleader intended to rely, it is enough to say that the second paragraph does not charge that the animals were purposely or intentionally injured. *Belt R. R. Co. v. Mann*, 107 Ind. 89; *Louisville, etc., R. W. Co. v. Bryan*, 107 Ind. 51; *Gregory v. Cleveland, etc., R. R. Co.*, 112 Ind. 385.

After the evidence was closed, the plaintiffs openly disclaimed any right to recover upon the first paragraph of their complaint, whereupon the court, of its own motion, instructed the jury to return a verdict for the defendant, on the ground that it appeared from the evidence that the plaintiffs were guilty of contributory negligence in permitting

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their animals to run at large in the vicinity of a railroad crossing. This is complained of as error.

It is proper for the court to direct a verdict for the defendant when the essential facts showing that the plaintiff has no right to recover are not controverted, or where, taking the plaintiff's evidence and all the legitimate inferences which a jury might reasonably draw from it, it is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside. *Gregory v. Cleveland, etc., R. R. Co., supra*, and cases cited.

The appellants insist that contributory negligence is no defence in cases where animals are injured in consequence of the failure of a railroad company to fence its road as the statute requires, or where the injury is purposely or wilfully committed. Both of these propositions are abundantly settled in favor of the appellants' contention, but neither of them is involved in this appeal.

As we have seen, the appellants disclaimed any right of recovery under the first paragraph of their complaint, and the second, the only one to which the evidence was applicable, notwithstanding it abounds in vituperative epithets, was merely a common law action for negligence.

The evidence shows that the animals were wandering, unattended, on a public highway, and that they went upon the railroad track within the highway limits, and were there injured by a passing train. The facts are uncontroverted that the whistle was sounded for the crossing, and that the engineer gave the alarm to frighten the animals off the track. It is not apparent, therefore, that the railroad company was guilty of any negligence. It can hardly be expected that a train approaching a highway must be stopped whenever animals are seen on the crossing. If the statutory signals have been given, and reasonable efforts made, in the customary manner, to frighten the animals away, the railroad company has discharged its duty, so far as it relates to the owner of animals which are found on a public crossing. But even if

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the railroad company had been remiss in its duty, the instruction of the court was plainly right, since the uncontroverted evidence shows that the plaintiffs were guilty of contributory negligence in permitting their animals to run at large, unattended, in the vicinity of a railroad crossing.

It is quite true the animals were at large under the permission of an order of the board of commissioners, but this did not impose any new duties or additional obligations on the railroad company. The owner of the animals thus at large may not be liable as a wrong-doer for injuries done by them while on the public highways and commons, but he may not abandon them to the hazard of being injured on a railroad crossing by permitting them to roam at large in the vicinity of a crossing, or other place where the road can not be fenced, and yet recover for the injury, even though the company may also have been negligent at the time the injury was suffered. *Michigan Southern, etc., R. R. Co. v. Fisher*, 27 Ind. 96.

It has been decided over and over again, as stated in the head-note in *Wabash, etc., R. W. Co. v. Nice*, 99 Ind. 152, that one who voluntarily permits his cattle to run at large near a railroad, where it is not required to be fenced, is guilty of contributory negligence if the cattle stray upon the track and are killed by the negligent management of a train of cars passing upon the railroad. Persons who carelessly or rashly permit their animals to roam upon the track of a railroad at a place where it can not be fenced, to the peril of the lives of passengers and others lawfully using the road, can not recover if the animals are injured, unless they show an actual or constructive intent or purpose to commit the injury. Where the proof clearly shows that the conduct of the company, or of its agents and servants, was so reckless as to manifest an utter disregard for consequences, and to imply a willingness to inflict an injury which might reasonably have been avoided, after the presence of the animals upon the track was known, a recovery may be sus-

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tained, under a proper complaint. Neither the complaint nor the proof makes the present such a case. *Durham v. Musselman*, 2 Blackf. 96.

The judgment is, therefore, affirmed, with costs.

Filed June 7, 1889.

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No. 13,807.

WHITE v. KELLOGG ET AL.

**ASSAULT AND BATTERY.—***Damages.—School Teacher.—Township Trustee.—School Director.*—Where a township trustee and a district school director, upon the refusal of a duly employed teacher to allow a vacation of the school for a time, which they and certain patrons of the school have demanded, enter the school-house, of which the teacher is in rightful and peaceable possession, seize the latter and pull, drag and throw him out of the building, inflicting serious injuries upon him, they are guilty of a wrongful assault and battery and are liable for damages.

**SAME.—***License to Teach.—Special Finding.*—In such a case, it is not necessary to the maintenance of the action that the special verdict, should show that the plaintiff was a licensed teacher when the school term began; but if it were, a finding that he was employed by the trustee, whose legal duty it was to employ only qualified persons, that he was licensed when the contract was made and that his license had not been revoked when a successor in the school was employed after his injury, would be sufficient.

**SAME.—***Employment of Teacher.*—A finding that the plaintiff was employed as a teacher by K., who was at the time trustee of the township, sufficiently shows that the employment was by the school trustee, the township trustee being *ex officio* school trustee.

From the Elkhart Circuit Court.

*J. M. Vanfleet*, for appellant.

*J. H. Baker* and *J. H. Defrees, Jr.*, for appellees.

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White v. Kellogg *et al.*

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BERKSHIRE, J.—This action was brought by the appellant against the appellees to recover damages for an alleged assault and battery upon the person of the appellant.

There was a jury trial and a special verdict returned by the jury. Upon the facts returned in the verdict, the court found the law to be with the defendants and rendered judgment accordingly.

The only error assigned which we need consider is the one which presents for consideration the action of the court in rendering judgment for the defendants.

The special verdict is quite lengthy and is pregnant with evidentiary facts, and for that reason not according to good practice; but so far as the facts are properly found they must be considered, and that which is mere evidence disregarded. We find disclosed by the verdict the following facts:

The appellant, being a duly qualified and licensed teacher, was, on the 11th day of September, 1884, duly employed by contract in writing by the appellee Kellogg, who was the trustee of Concord township, in Elkhart county, to teach the school in district No. 8, in said township, for the term commencing October 27th, 1884. At the time of the employment there was some talk about a vacation to be given at some time during the term, but nothing definite was agreed upon. At the annual school meeting, held on the 4th day of October, a resolution was adopted that after the school had continued for four months, then there should be a vacation for one month, to which, when informed of the resolution, the appellant refused his assent. On the 27th day of October, the appellant entered upon his duties as teacher of the school, under his said employment, and taught without interruption until the 11th day of March. On the 7th day of March, a school meeting was held by the legal voters and taxpayers of the district, and at the meeting it was resolved that there should be a vacation in the school of two weeks' duration, to begin on the following Monday, March 9th,

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and the appellee Martin, who was the school director, was directed to see his co-appellee and request him to order the vacation as agreed upon. The director communicated with the trustee, as directed, and the trustee with the appellant, who declined to allow the vacation. The number of pupils in regular attendance at the school was sixteen, but on Monday, March 9th, but two were present. On Tuesday (the appellant having in the meantime visited the patrons of the school) there were thirteen pupils present, and the parents of the said thirteen pupils having signed a petition requesting that the school continue and that there be no vacation, the appellant on Tuesday evening presented the said petition to the trustee, who refused to recognize the same, and informed the appellant that if he opened the school the next day he would close it. On the next day, March 11th, the appellant opened the school-house as usual, preparatory to going on with the school for the day, but before the opening of the school, the appellee Kellogg came to the school-house and informed the appellant that he had come to close the school, and was by the appellant refused admission. He then attempted to force his way into the house, and the appellant with force opposed his entrance. At this juncture the appellee Martin came up, and, by the request of his co-appellee, they forced their way into the house, their entrance being resisted by the appellant. The appellant then opened the school, there being thirteen pupils present, and began the exercises, when the appellees seized him at his desk and with violence threw him upon the floor, and notwithstanding his resistance, dragged, pulled, and threw him out of the house, injuring him seriously, and afterwards closed the house and kept it closed.

The appellant was laid up and unable to work, on account of injuries received, for the space of seventy days, and did employ a physician to attend him on account of his injuries, and lost the balance of his school term, the appellee Kellogg having employed another teacher to finish the term,

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although no petition was ever presented asking for the appellant's removal, nor were any charges brought against him, nor had his license been revoked.

It is found that in ejecting the appellant from the school-house the appellees used no more force than was necessary to remove him therefrom.

It is our opinion that the court committed an error in rendering judgment for the appellees; that upon the facts, as found, judgment should have been rendered for the appellant. In our opinion the facts found disclose an aggravated case of assault and battery.

The point is made by counsel for the appellees that the verdict fails to show the plaintiff to have been a licensed teacher when the school term began. We do not think this was necessary to a maintenance of the action, but we think the fact appears in the verdict. In the first place it would have been in violation of his duty for the trustee to contract with a person not having the necessary qualifications to teach the school when the time arrived for it to open; and it is found that the appellant was duly licensed when the contract was entered into, and that his license had not been revoked when his successor was employed.

Another point made is, that the facts found do not show an employment from the school trustee to teach the school. The facts, as found, show that the contract was made with the appellee Kellogg, who at the time was the trustee of the township. If he was township trustee, he was school trustee; for, *ex officio*, the township trustee is the school trustee of the township. But, independent of these questions, under a contract with the trustee to teach the school for the term, the appellant went into possession of the school-house, entered upon his duties as the teacher of the school, and, without interruption, taught the school for four months, and on the morning of the difficulty was in peaceable possession of the school-house, and was about to open the school when the appellees brought on the disturbance. The appellant

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Wright *et al.* v. Hughes, Assignee, *et al.*


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was not holding the possession wrongfully, but was there by right, and the appellees, when they undertook to dispossess him, were wrong-doers. *Johnson v. Putnam*, 95 Ind. 57; *Judy v. Citizen*, 101 Ind. 18, where the whole subject is discussed; *Low v. Elwell*, 121 Mass. 309; *Fifty Associates v. Howland*, 5 Cush. 214.

We have not determined as to whether the school district or school trustee may, under any circumstances, compel a teacher, in the midst of his term, to give a vacation; there may be circumstances where this would be proper; for instance, if a contagious and dangerous disease was in the school district, or in the vicinity thereof.

The judgment is reversed, with costs, with instruction to the court below to render judgment for the appellant upon the verdict.

Filed June 7, 1889.

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125	351
119	324
143	557
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146	552
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157	140
119	324
160	104

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No. 13,761.

### WRIGHT ET AL. v. HUGHES, ASSIGNEE, ET AL.

**CORPORATION.—Powers.—Right to Borrow Money.**—Where general authority is given a corporation to engage in business, it takes the power, in the absence of charter restraints, as a natural person enjoys it, with all its incidents, and may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden.

**SAME.—Insurance Company.—Borrowing Money.—Mortgage.—Ultra Vires.—Estoppel.**—A corporation organized under the law of this State providing for the organization of life and accident insurance companies, has power to borrow money and secure its payment by mortgaging its real estate, and where it has done so and used the money and subsequently become insolvent, neither the corporation nor the policy-holders will be



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heard to assert that the mortgage is void on the ground that the corporation had no power to engage in the transaction in which the borrowed money was used.

**SAME.**—*Lender's Knowledge of Use to be Made of Money.*—A mortgage executed by a corporation to secure money borrowed by it, to be used in a transaction in which it has no power to engage, may be enforced, if no statutory prohibition is involved, where the lender was not in complicity with the borrower in carrying out the *ultra vires* transaction, although he may have known of the purpose for which the money was obtained.

**SAME.**—*Estoppel to Deny Power to Contract.*—Where a contract has been executed and fully performed on the part of the corporation or of the person with whom it contracted, neither party will be permitted to assert that the contract was not within the power of the corporation.

From the Marion Superior Court.

*J. P. Baker, L. Wallace, Jr., and J. P. Dunn, Jr., for appellants.*

*A. Baker, E. Daniels, F. Winter and J. B. Elam, for appellees.*

**MITCHELL, J.**—This was an action by certain of the policyholders of the Franklin Life Insurance Company, the purpose of which was to have cancelled and declared void a mortgage executed by the directors of the above named corporation to the Northwestern Mutual Life Insurance Company.

The questions for decision arise on the complaint, which is in two paragraphs, both of which are in legal effect alike. It appears that the Franklin Life Insurance Company was organized in July, 1866, under the general law which provides for the organization of mutual life and accident insurance companies. Section 3763, R. S. 1881. The company was organized upon the life plan. Its charter provided that the entire management and control of the affairs and business of the corporation should be confided to its board of directors, who were given full power over the affairs of the company. In August, 1881, the board of directors, having discovered that the business of the company had decreased

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*Wright et al. v. Hughes, Assignee, et al.*

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and become unprofitable, and that it was being conducted at a loss, adopted a resolution authorizing the executive officers to buy in all its outstanding paid-up policies, with the view of winding up the business of life insurance, and of changing from life to accident insurance. It is averred that the change was made without the consent of the plaintiffs, who are and were policy-holders, and without any amendment of the articles of association, or the consent of the State. In January, 1882, the board of directors again resolved to continue the scheme of retiring the company's life policies, and the executive officers were accordingly directed to buy in all outstanding policies of that description, on the most advantageous terms. In executing these directions, \$90,000, all the available assets of the company, was expended in purchasing policies, and it became necessary, in order to complete the purchases, to borrow money. Accordingly a loan of \$37,500 was negotiated with the Northwestern Mutual Life Insurance Company. The money was obtained and used in purchasing policies. As security for the loan, which was evidenced by a bond running five years with semi-annual interest, a mortgage was executed on the real estate and office buildings of the company, the mortgagee having knowledge of the purpose for which the money was obtained and used. Subsequently the Franklin Life Insurance Company became insolvent and made a voluntary assignment. At the time the assignment was made there remained outstanding about three hundred life policies, representing a surrender value of \$75,000, while the assets of the company, after deducting the amount of the debt secured by the mortgage in controversy, aggregated something less than \$18,000. It is alleged that the assignee recognized the mortgage in question as a valid obligation, and that he refused to take any steps to set it aside. The plaintiffs, therefore, bring the suit as policy-holders, and ask that the mortgage be declared void, and that it be cancelled and the mortgagee restrained

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from asserting any claim on account thereof, or on account of the money loaned.

On appellants' behalf it is contended that the facts stated in the complaint show that the money, to secure which the mortgage was given, was borrowed so as to enable the board of directors to buy up for the company its outstanding life policies, in an unauthorized and unequal manner, with a view to effect a change of the company's business from life to accident insurance; that the corporation had neither the power to wind up its life insurance business by the method pursued, nor had it the power, under its articles of association, to engage in the business of accident insurance; and that hence the loan from and transaction with the Northwestern Mutual Life Insurance Company were *ultra vires*.

The proposition advanced, that a corporation can not, without the consent of the shareholders, abandon the fundamental purpose for which it was organized and engage in transactions, or embark its capital in enterprises, other than those which come legitimately within the scope of its charter, is abundantly maintained. Green's Brice's *Ultra Vires*, 77. Accordingly, it is the established rule that a stockholder, or other person interested, who has not consented, may invoke the aid of a court of chancery to restrain the managing directory from engaging or continuing in an enterprise which involves a material change in the original purposes or powers of the corporation, and which is not in aid of its primary object. *Board, etc., v. Lafayette, etc., R. R. Co.*, 50 Ind. 85; *McCray v. Junction R. R. Co.*, 9 Ind. 358; *Bradley v. Ballard*, 55 Ill. 413; 1 Morawetz Corp., sections 273, 274.

This rule is neither technical nor arbitrary, but has for its foundation the means of affording protection to stockholders who resort to it in good faith for the purpose of holding the corporation to the prosecution of its legitimate and proper business. *Holt v. Winfield Bank*, 25 Fed. Rep. 812.

The appellants, it may be well to remark, are not in a court

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of equity, asking that the corporation in which they are interested as members and policy-holders be restrained from embarking in an enterprise foreign to its original purpose, or from winding up the corporate business. These are all matters of the past. The charter of the corporation has been forfeited to the State, and its business is being wound up without objection from the plaintiffs, so far as appears. The only question here is, whether the plaintiffs, who in this proceeding occupy the place of the corporation, may now question the power of its directors, who were entrusted with the management of its affairs, to borrow the money and execute the bond and mortgage which they now seek to have cancelled and declared of no effect, after the corporation has received into its treasury and used the money which they were given to secure. The weight of modern authority supports the conclusion that private corporations, organized for pecuniary profit, may, like individuals, borrow money whenever the nature of their business renders it proper or expedient that they should do so, subject only to such express limitations as are imposed by their charters. The power to borrow carries with it, by implication, unless restrained by the charter, the power to secure the loan by mortgage. Accordingly it may be regarded as settled, that where general authority is given a corporation to engage in business, and there are no special restraints in its charter, it takes the power as a natural person enjoys it, with all its incidents and accessories; it may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden. *New England, etc., Ins. Co. v. Robinson*, 25 Ind. 536; *Jones v. Guaranty, etc., Co.*, 101 U. S. 622; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Booth v. Robinson*, 55 Md. 419; *Hays v. Galion Gas Light Co.*, 29 Ohio St. 330; *Memphis, etc., R. R. Co. v. Dow*, 19 Fed. Rep. 388; Green's Brice's *Ultra Vires*, 223; 1 Morawetz Corp., sections 342, 343.

In the absence of any express or implied limitation upon

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the power of the Franklin Life Insurance Company to borrow money, it might well be held, for anything that appears in the complaint, that the board of directors, in whom was vested broad and comprehensive powers in respect to the management of the business of the corporation, did not exceed its authority in making the loan for the purpose of buying in outstanding policies, if that seemed the best method to avert financial disaster. However this may be, since there was no statute prohibiting the company from purchasing its outstanding policies, or from borrowing money for that purpose, and the transaction was not intrinsically illegal or immoral, the bond and mortgage given to secure the loan of money to be used in taking up the policies were not void. The plaintiffs having come into a court of equity to avoid a transaction which at the most was only voidable, they must, in order to obtain any standing, offer to do equity. It is not equitable to ask a court of conscience to avoid a mortgage given to secure borrowed money without offering to return the money which has been received. Having received the full benefit of the contract, it would now be a glaring injustice to allow those representing the corporation to set it aside and retain the benefit by sustaining their contention that the loan was *ultra vires*. Especially as this doctrine only concerns the corporation in its relations with the State and with its stockholders, and is never entertained where it will injure innocent third persons. *Bissell v. Michigan Southern, etc., R. R. Co.*, 22 N. Y. 258.

Where a corporation makes a contract that is in excess of its chartered powers, it may well be that while the agreement remains wholly executory it can not be enforced. So long as the contract is unexecuted it does not estop the corporation, because the power of a corporation, like that of a person under a legal disability, can not be enlarged by the mere form of a contract which it had no capacity to make. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543. The doctrine of *ultra vires* may be appealed to in such a case to re-

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sist the enforcement of a contract. It would be carrying that doctrine to an unwarranted extent, however, to hold that a corporation might obtain the money of another, and, with the fruits of the contract in its treasury, interpose the defence of *ultra vires*, or, having used the money with the consent or acquiescence of its stockholders, ask that the lender be restrained from collecting it back, on the ground that the money was obtained in violation of the charter of the corporation. Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of *ultra vires* unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud. After a corporation has received the fruits which grow out of the performance of an act *ultra vires*, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract, in order to escape the performance of an obligation it has assumed. The most that can be said in the present case is, that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act. *Sondheim v. Gilbert*, 117 Ind. 71; *Cummings v. Henry*, 10 Ind. 109; *Bickel v. Sheets*, 24 Ind. 1.

Wharton states the rule thus: "It is not enough that the party lending might have foreseen that the money would have been likely to have gone to an illegal object, or that the person borrowing was engaged in illegal enterprises. Nor will it be enough that there was an intention that the party

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borrowing should illegally appropriate the loan. He must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction." Law of Contracts, sections 341, 343; *Thompson v. Lambert*, 44 Iowa, 239.

The conclusion which follows is, that even if it were conceded that the money was borrowed to be used in a transaction altogether beyond the power of the corporation, and that the lender knew the purpose for which it was to be used, since there is no statutory prohibition involved, and the lender was in no way in complicity with the borrower in carrying out the transaction in which the money was used, there exists no impediment against the enforcement of the contract.

As there was, at the utmost, merely a defect of power in the corporation to engage in the transaction in which the money was used, and no restriction whatever upon its power to make the loan and execute the securities here in question, neither the corporation nor the plaintiffs, who occupy its place, will be heard to assert that the transaction in which the money was borrowed was *ultra vires*. If, however, it were conceded that the borrowing of the money was a transaction beyond the chartered power of the corporation, the authorities fully justify the conclusion that it would not be heard to assert the invalidity of the transaction while it retained its fruits. The rule is now too thoroughly established to be longer open to question, that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation. *State Board, etc., v. Citizens Street R. W. Co.*, 47 Ind. 407; *Louisville, etc., R. W. Co. v. Flanagan*, 113 Ind. 488 (3 Am. St. Rep. 674); *Chicago, etc., R. W. Co. v. Derkes*, 103 Ind. 520; *Pancoast v. Travelers Ins. Co.*, 79 Ind. 172; *Hitchcock v. Galveston*, 96 U. S. 341; *Railway Co. v. McCarthy*, 96 U. S. 258; *Brad-*

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*ley v. Ballard, supra; Memphis, etc., R. R. Co. v. Dow, supra; Whitney Arms Co. v. Barlow, 63 N. Y. 62.*

“Corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so, their exemption from liability can not be claimed on the mere ground that they have no attributes or faculties which render it possible for them thus to act.” *Bissell v. Michigan Southern, etc., R. R. Co., supra.*

The law never sustains the defence of *ultra vires* out of regard for the corporation. It does so only where the most persuasive considerations of public policy are involved. *Wright v. Pipe Line Co., 101 Pa. St. 204; Oil Creek, etc., R. R. Co. v. Penn. Transp. Co., 83 Pa. St. 160; Ottawa Northern Plank Road Co. v. Murray, 15 Ill. 336.*

There are some other points of minor importance discussed in the briefs, but they do not affect the merits of the controversy. The complaint did not state facts sufficient to constitute a cause of action.

The judgment is affirmed, with costs.

Filed June 8, 1889.

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No. 14,910.

KINNINGHAM v. THE STATE.

CRIMINAL LAW.—*Arson.—Attempt to Commit.—Indictment.*—An indictment charging that the defendant did “unlawfully, feloniously and wilfully attempt to set fire to and burn and destroy” a building, is bad, no act being charged.

SAME.—*Indictment Must State the Acts Done.*—To constitute crime there must



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be both an act and a guilty intention, and the acts done by the accused must be stated in the indictment.

From the Decatur Circuit Court.

*J. S. Scobey*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, C. J.—Several objections are urged against the indictment upon which the appellant was convicted, but we deem it necessary to notice only one of them. The indictment charges in general terms that the defendant did “unlawfully, feloniously and wilfully attempt to set fire to and burn and destroy a certain frame building, commonly called a barn.” No act is charged, and the indictment is radically bad. The charge that the defendant did attempt to do a designated thing is really little more than an averment that he intended to do the thing, and to constitute crime there must be both an act and a guilty intention. Where it is sought to charge an accused with a crime, the acts done by him must be stated. 1 Bishop Crim. Law, section 659.

Judgment reversed.

Filed June 8, 1889.

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No. 13,473.

PLATT v. BRICKLEY.

PLEADING.—*Answer*.—*Exhibit*.—A deed which is filed as an exhibit with an answer, but which is not the foundation of the defence pleaded, is not a part of the answer, and can not be looked to in determining its sufficiency.

SAME.—*Reply*.—*References to Exhibit*.—Where the substantive averments of a reply consist of references to an exhibit filed with the answer, but constituting no part thereof, the reply is bad.

DECEDENTS' ESTATES.—*Conveyances by Heir*.—*Administrator's Sale*.—*Parties*.—

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An heir, who has conveyed his interest in a decedent's real estate, is not a necessary party to an application by the administrator for an order to sell such real estate, and if not a party is not concluded by the proceedings.

**SAME.**—*Failure of Title.*—*Laches of Grantee.*—*Promissory Note.*—In such case, in an action by the grantor heir against his grantee upon a purchase-money note, a reply to the defence of a failure of title, that the defendant had assumed to pay the indebtedness to pay which the real estate was sold by the administrator, but had failed to do so, is good.

From the Wells Circuit Court.

*E. R. Wilson* and *J. J. Todd*, for appellant.

*J. S. Dailey*, *L. Mock* and *A. Simmons*, for appellee.

**BERKSHIRE, J.**—This is an action upon a promissory note. The appellee answered: 1. Want of consideration. 2. Payment. 3. Failure of consideration.

The court sustained a demurrer to the third paragraph of answer, and an amended third paragraph was filed and a demurrer was filed thereto; the demurrer was overruled and an exception reserved.

The appellant filed a reply in four paragraphs, the first of which was a general denial. The appellee demurred to the other paragraphs; the demurrer was overruled to the second paragraph, and an exception reserved, and sustained to the third and fourth paragraphs, and leave taken to amend. Amended third and fourth paragraphs were filed, and also a fifth paragraph. The appellee demurred to each of these paragraphs, and the demurrers were overruled to the third and fourth, and sustained to the fifth, and exceptions reserved. The case, being at issue, was submitted to the court for trial, and at the request of the parties a special finding was made. Upon the finding of facts, the court found the law to be with the appellee, to which conclusions of law the appellant excepted, and a judgment was rendered for the appellee.

There was a cross-complaint filed by the appellee, but as the court seems to have ignored the cross-action in its finding and in the judgment rendered, we need not notice it.

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There are several errors assigned. We have concluded to set out the third paragraph of the answer, which is as follows :

“And for a third answer to said complaint, the defendant admits the execution of the note sued on, but says that on the 18th day of January, 1883, the plaintiff, together with her husband, Emanuel Platt, Franklin Taylor and Matilda Taylor, conveyed, or pretended to convey, to this defendant certain land described therein, a copy of which deed is filed herewith and made a part hereof, marked exhibit A ; that this plaintiff pretended to own the two-fifteenths part of said land, and Franklin Taylor pretended to own the two-fifteenths part of said land, when in truth and in fact this plaintiff owned no part of said land ; that it was in consideration of said land and for no other consideration that he executed the note sued on in this behalf and described in plaintiff’s complaint ; that he entered upon said premises and took possession of them in good faith, but says that one John H. Crum, administrator of the estate of David Taylor, deceased, who was the father of this plaintiff, and who died seized of said real estate, and which real estate was subject to the debts of said David Taylor, deceased, and said Franklin Taylor, at the September term of the Wells Circuit Court for the year 1883, asked of the said court an order to sell said land to pay the indebtedness of said decedent’s estate ; that on the 8th day of December, 1883, the same being the 18th judicial day of the November term of said court, the judge thereof ordered the same to be sold for the payment of said indebtedness by four weeks advertising in a newspaper, in Wells county, and after posting ; that on the — day of January, 1884, the said John Crum, as such administrator, pursuant to said order of said court, offered said land at public sale, and one Franklin A. Bratton, being the highest and best bidder, offered the sum of \$2,110, and the same was struck off and sold to the said Bratton ; that on the 6th day of February, 1884, the same being the 3d judicial day

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of the February term of said Wells Circuit Court for the year aforesaid, the said administrator made a report of said sale to the judge of said court, which sale was by said court confirmed, a deed ordered, which was made by said administrator, and by him reported to said court and approved by the court; that said deed was delivered to said Bratton, who entered on and took possession of said land, and the defendant's title received from this plaintiff to said land being worthless, he was evicted therefrom; hence he says the consideration of said note has failed, and that the plaintiff ought not to recover." The defence in this paragraph of answer averred is a failure of consideration.

If the copy of the deed, which is referred to as an exhibit, is to be regarded as a part of the answer, then the answer is bad, for the deed shows that the appellee assumed to pay so much of the indebtedness of the decedent's estate as was secured by a mortgage upon the land he purchased, and it is not shown that he paid this indebtedness, nor does it appear that if he had done so he would have lost the title to the land notwithstanding; nor do the averments show that if he had complied with the contract on his part there would not have been something due to the plaintiff on the note sued on. But the exhibit is no part of the answer, it not being the foundation of the defence therein alleged, and therefore it must be disregarded. We are of the opinion that the answer is good.

The third and fourth paragraphs of the reply are bad, and the demurrers should have been sustained to them.

The third paragraph does not aver that the appellee assumed the payment of the mortgage debt, only so far as it makes reference to the exhibit filed with the complaint, which, as we have said, is not a part of the record.

The fourth paragraph is bad, because the appellant, having conveyed her interest in the real estate, was not a necessary party to the application made by the administrator for an order to sell the real estate.

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Platt v. Brickley.

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The fifth paragraph of the reply was good, and the court erred in sustaining the demurrer thereto.

The appellant, not having been made a party to the proceedings to sell the real estate instituted by the administrator, and not having appeared in any way to the proceedings, she is not concluded thereby, but may allege and prove that the failure of title to the real estate for which the note in suit was given was because of appellee's failure to perform the obligation on his part whereby he acquired title to the land.

The fifth paragraph of the reply shows that the appellee assumed to pay the very indebtedness for which the real estate was sold, and that because of that failure he lost the land. But the appellee was not entitled to a judgment upon the special finding made by the court.

The sale averred in the third paragraph of the answer is a sale made pursuant to section 2338, R. S. 1881, *et seq.*, while the sale actually made, as found by the court, was under section 1186, R. S. 1881. The proceeds of the sale of the whole of the real estate, including the widow's interest, was the sum of \$2,110, the one-third of which was paid to the appellee, who held the widow's interest, leaving \$1,406.66, which the administrator applied in payment of claims allowed against the estate. The mortgage indebtedness, which the appellee assumed to pay, was a part of the indebtedness of said estate, and, as it was a preferred claim, we can but presume that it was paid in full, though said estate was found by the court to be insolvent. Whether or not there would have been an entire or partial failure of consideration for the note sued on had the appellee paid the mortgage indebtedness, we are unable to say from the facts stated in the special finding.

As there should, in our judgment, be another trial of this cause, it is proper that we state that, by the terms of the conveyance to him, the appellee assumed the payment of the mortgage indebtedness on the land, but none other. He was

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White v. D. S. Morgan & Company.

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given the privilege of paying other debts due from the estate of the decedent, but was not bound so to do.

Judgment reversed, with costs, and the court below is ordered to grant a new trial and proceed in accordance with this opinion.

Filed June 8, 1889.

119 338  
133 508

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No. 13,798.

WHITE v. D. S. MORGAN & COMPANY.

**WITNESS.**—*Examination of Party.*—*Notice of.*—*Contempt.*—*Striking Out Pleadings.*—A party's pleadings can not be stricken out, under section 513, R. S. 1881, because of his failure to appear for examination at the instance of the adverse party, unless the process requiring his appearance is issued by some proper court or officer, and he is in contempt thereof.

**PLEADING.**—*Motion to Strike Out.*—*Practice.*—A motion to strike out another motion to strike out is improper, and should not be entertained.

From the Benton Circuit Court.

*J. F. McHugh*, for appellant.

*J. W. Cole*, for appellee.

**OLDS, J.**—The appellee, a corporation, appointed the appellant its agent for the sale of reapers and mowers in Benton county, and the parties entered into a written contract, the appellant agreeing to guarantee the payment of all notes taken for appellee's machinery unless said notes contained a truthful property statement signed by the maker or makers of the note or notes, showing that such maker or makers were worth \$1,000 in real estate in excess of all debts, liabilities and exemption laws, and \$500 in personal property.

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White v. D. S. Morgan & Company.

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This action is brought by the appellee, alleging that the appellant failed to keep said contract, and sold one of its machines to John and Harriet Bullington, and failed to obtain a property statement as required by the contract.

After the cause was at issue, and during the vacation of the Benton Circuit Court, the plaintiff's attorney, on the 26th day of February, 1887, caused a notice to be served upon the defendant by the sheriff of said county, notifying the defendant to appear at the office of Wm. L. Bartlett, a notary public, in Ambia, Benton county, Indiana, on Thursday, March 3d, 1887, at 10 o'clock A. M., before some officer authorized to take depositions, to answer under oath such questions as might be asked him concerning the matter in litigation then pending in the Benton Circuit Court between the plaintiff and defendant. The notice was signed by the plaintiff's attorney. On the 7th day of March, 1887, the plaintiff's attorney caused another notice to be served on the defendant by the marshal of the town of Ambia, in substance the same as the former notice, fixing the day to appear on the 12th day of March, 1887, and stating that the plaintiff would proceed to take the defendant's deposition, to be read in evidence at the option of the plaintiff in the said cause pending in said Benton Circuit Court.

On the 26th day of March the plaintiff's attorney caused a like notice, as the last above described, to be served on the defendant by a constable, notifying the defendant to appear, for the purpose of allowing his deposition to be taken, on the 4th day of April, 1887. The defendant failing to appear in response to either of the notices served upon him, at the April term, 1882, of the Benton Circuit Court, the plaintiff moved the court to strike out the defendant's answer, and filed in support of the motion the affidavit of his attorney showing the service of the respective notices on the defendant, and that he failed and refused to appear and submit to an examination, and that on each and all of said days named in said notices the plaintiff was present by counsel at

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White v. D. S. Morgan & Company.

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the place named in said notices, with a notary public ready to take said defendant's deposition at the times and place named in said notices.

The court sustained the plaintiff's motion, and struck out the defendant's answer, and rendered judgment for the plaintiff upon his complaint. The question is properly saved by bill of exceptions, and such ruling of the court is assigned as error.

The case of *Bish v. Beatty*, 111 Ind. 403, is decisive of the question in this case. It is held in that case that a party is not liable to the consequences provided in section 513, R. S. 1881, which authorizes the court to punish the party as for a contempt, and to strike out the pleadings filed by the party in default, unless such party has been duly served with process issued by some proper court or officer, and is in contempt of such court or officer. In this case, as in the case of *Bish v. Beatty*, *supra*, the notice was not issued by any officer. The court erred in sustaining the motion to strike out appellant's answer and in rendering judgment in favor of appellee, and the judgment must be reversed.

We think it proper to add that, while the question is properly reserved in this case by a bill of exceptions as to the final ruling in the case, there are numerous surplus motions and assignments of error. Such a motion as is made in this case, to "strike out another motion to strike out," is not known in either the code or common law system of pleading. When a motion is made to strike out a pleading, or a part of a pleading, the question is properly reserved by an exception to the ruling of the court, and preserved by a bill of exceptions. A "motion to strike out another motion to strike out," and to reject a demurrer, are usually frivolous, and ought not to be entertained or entered of record by the trial court.

Judgment reversed, with costs.

Filed June 18, 1889.



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 Morris v. Morris *et al.*


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No. 13,740.

## MORRIS v. MORRIS ET AL.

**WILL.**—*Partial Intestacy.*—*Widow.*—*Election to Take under Law.*—*Descent.*—

Where a widow refuses to accept the provision made for her by her husband's will and elects to take under the law, she takes one-third of his land in fee, and, if he leaves no child and no father or mother, she also takes, under section 2490, R. S. 1881, any portion of his estate left undisposed of by the will, and no more.

**SAME.**—*Contest of.*—*Mental Capacity.*—*Evidence.*—*Physician's Privileged Knowledge.*—*Waiver of Privilege.*—In a proceeding to contest a will on the ground of the mental incapacity of the testator, the executor or administrator, as the legal representative of the patient, and seeking to maintain the will, has the right to waive the privileged character of knowledge acquired by a physician, while attending the testator in his last illness, as to the latter's mental condition, and call him as a witness to testify as to such mental condition when the will was executed.

**EVIDENCE.**—*Exclusion of Testimony.*—*Saving Question Upon.*—*Practice.*—In order to save any question upon the exclusion of testimony, a proper question should be asked, and, upon objection being made, the fact expected to be proved by the witness should be stated to the court.

**INTERROGATORIES TO JURY.**—*Submission of.*—*Time of Asking.*—*Presumption.*—Everything will be presumed in favor of the action of the trial court, and if it does not appear by the record at what time the court was asked to submit interrogatories to the jury, its refusal to submit them will not be reviewed.

From the Washington Circuit Court.

*J. A. Zaring, M. B. Hottel and J. B. Brown,* for appellant.

*S. B. Voyles, H. Morris, S. H. Mitchell, R. B. Mitchell and Hobbs & Paynter,* for appellees.

**COFFEY, J.**—This was a suit by the appellant against the appellees to contest the will of Thomas Morris, deceased. The complaint is in two paragraphs. The first paragraph charges that the said Thomas Morris, at the time of the execution of the will in controversy, was a person of unsound mind and incapable of executing a will.

The second paragraph is substantially as follows: That

119	341
126	563
119	341
137	172

119	341
154	580
156	588

119	341
171	337
171	689

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Morris v. Morris *et al.*

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plaintiff is the surviving widow of Thomas Morris, deceased ; that said Thomas departed this life on the — day of —, 1886, in Washington county, Indiana, leaving both real and personal estate and leaving a will, by the terms of which the defendant Micah Morris was appointed executor, which will is as follows :

“ Item 1st. I desire my debts to be paid. Item 2d. As to my farm in said county, to wit, eighty-four acres off the east side of the northeast quarter of section 36, township 3 north, range 4 east, I make the following disposition of the same : I devise the said farm and land to my brother, Micah Morris, to be his in fee simple, reserving to myself and wife, Hannah Morris, full control and possession of said farm during each of our lives ; but if my said wife shall not elect to accept the terms of this will at my death, I devise to her a life-estate in said land anyhow, and at her death two-thirds of the land in fee shall be and the same is hereby devised to my said brother. I appoint my brother, Micah Morris, as executor of this, my last will and testament.”

That said will has been duly probated, and the plaintiff herein has filed in the clerk's office of said county her intention to take the provision made by law, and her refusal to take the provision made for her by the terms of said will ; that by the provisions of said will, when she refused to take under the same, there is a life-estate in said land for which there is no provision made, and which is not disposed of by said testator ; that when she refused to take under said will said testator became intestate as to said life-estate ; that said last will is void on its face ; that the said Thomas Morris never had any children, and that he left surviving him neither father nor mother ; that the plaintiff, as the surviving widow of the said Thomas Morris, is entitled to all his estate, both real and personal. Prayer that the will be declared void and the plaintiff decreed to be the owner of all said property.

The court sustained a demurrer to the second paragraph

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Morris v. Morris *et al.*

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of the complaint, and the appellant excepted. The cause was put at issue by a general denial. A trial of the cause resulted in a verdict and judgment for the appellees.

The appellant assigns as error: 1st. That the court erred in sustaining a demurrer to the second paragraph of the complaint. 2d. That the court erred in overruling the motion for a new trial.

It is earnestly insisted by the appellant that when she refused to take the provisions made for her by the will of her late husband, it became impossible to carry out the intentions of the testator, and that, therefore, the will became void, and that she, as the widow, became entitled to the whole estate.

We can not agree with appellant in this position. Our statute of descents provides that if a husband or wife die intestate, leaving no child and no father or mother, the whole of his or her property, real and personal, shall go to the survivor. Section 2490, R. S. 1881.

When appellant refused to accept the provisions made for her by the will of her husband, she took such interest in his property as was given her by statute. That interest was one-third of his land in fee, and if there was any portion of his estate undisposed of by will, as he left no child, nor father or mother, she took it under the provisions of the above statute. *Cool v. Cool*, 54 Ind. 225; *Rusing v. Rusing*, 25 Ind. 63; *Dale v. Bartley*, 58 Ind. 101; *Lindsay v. Lindsay*, 47 Ind. 283; *Armstrong v. Berreman*, 13 Ind. 422.

We do not think the court erred in sustaining the demurrer to the second paragraph of the complaint.

On the trial of the cause, the appellees were permitted to prove by the physician who attended the testator in his last illness that he was a person of sound mind. The appellant objected to the competency of this evidence, on the ground that the knowledge possessed by the witness was privileged, and that the physician could not be permitted to testify to this fact without the consent of the appellant.

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Morris v. Morris et al.

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It is settled in this State that all knowledge relating to the condition of a patient, obtained by the attending physician while in the discharge of his duty as such physician, is confidential and privileged, and that he can not be permitted to testify to the same, in a court of justice, without the consent of the patient or his representative. *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92; *Masonic Mut. Benefit Ass'n v. Beck*, 77 Ind. 203. The patient or his legal representative may, however, waive the objection to such privileged communications and permit the physician to testify thereto. In this case the appellee George Barnett is the administrator of the estate of Thomas Morris, deceased, with the will annexed, and the record shows that he waived the privilege of excluding the testimony of the attending physician, and in fact called him as a witness. He was the representative of the testator and was seeking to maintain his will, and had the right, we think, as such representative, to call the physician who attended the testator in his last illness to prove the condition of his mind at the time the will was executed. The appellant also called a physician and sought to prove by him the condition of the testator's mind at a date prior to the execution of the will, but the record fails to disclose that any question was propounded to the witness calculated to call out any fact. To present the question here sought to be raised, the witness should have been asked a proper question, and, upon objection made, the fact expected to be proved should have been stated to the court. *Higham v. Vanosdol*, 101 Ind. 160; *Beard v. Lofton*, 102 Ind. 408. This was not done, and, therefore, no question is before us for decision upon the exclusion of this offered evidence.

The appellant by her counsel prayed the court to require the jury, in the event they found a general verdict in the cause, to answer the following interrogatory:

“ Was Thomas Morris, deceased, a person of sound or unsound mind at the time he executed the will mentioned in the plaintiff's complaint? ”

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Maguire *et al.* v. Bissell.

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Without deciding whether it would be proper to require the jury to answer such an interrogatory as this when properly asked, it is sufficient to say in this case that the record does not disclose when the court was asked to submit this. For anything that appears from the record, this may have been asked after the jury had been fully instructed and had retired to consider of their verdict, and may have been refused for that reason. Everything is to be presumed in favor of the action of the trial court. *Binford v. Miner*, 101 Ind. 147; *Railsback v. Walke*, 81 Ind. 409.

The instructions, we think, fairly state the law of the case as made by the evidence, and the evidence tended to support the verdict of the jury. We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed June 18, 1889.

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119	345
120	63

No. 12,339.

MAGUIRE ET AL. v. BISSELL.

**REAL ESTATE.—Mortgage.—Description.—Words Expressing Quantity.—**A mortgage contained a description of a part of lot 10, block 37, in the city of Indianapolis, the metes and bounds given making 45 feet and 6 inches on Delaware street, by 163 feet and 7 inches in depth. It also included other ground, described as “also, fourteen feet and six inches (14 ft. 6 in.) off the south side of lot eleven (11) in said square thirty-seven (37), of the city of Indianapolis, being in all sixty (60) feet front on Delaware street, by one hundred and sixty-three feet and six inches in depth.” Lot 11 was, in fact, 196 feet in depth. The mortgage was foreclosed and the land sold, the description as given being carried through all the proceedings.

*Held*, that the words italicised are not words of description, qualifying

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*Maguire et al. v. Bissell.*

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the preceding words, but words expressing quantity merely, and that a strip of ground off the south side of lot eleven 14 feet and 6 inches wide by 196 feet in depth passed by the mortgage and sale.

From the Marion Superior Court.

*J. S. Tarkington*, for appellants.

*D. M. Bradbury*, for appellee.

BERKSHIRE, J.—This is an action brought by the appellee against the appellants to quiet title to real estate. There were originally four paragraphs in the complaint. The court below sustained demurrers to the first and fourth, and they passed out of the record. Issues were joined on the second and third paragraphs, and upon the trial at special term, which was a trial by the court, the finding was for the appellee, and, over a motion for a new trial, judgment was rendered for the appellee. An appeal was taken to the general term, and the judgment of the court in special term was affirmed.

The second paragraph of the complaint is somewhat lengthy, but among other things alleged therein are the following: The appellant Anna R. Maguire was the owner in fee simple, on the 3d day of May, 1876, of the following real estate in Marion county, Indiana, to wit: 163 feet off of the east end of lot numbered 10, square 37, in the city of Indianapolis, fronting on Delaware street, and 14½ feet off of the south side of lot No. 11, in said square, fronting on said Delaware street, adjoining said lot 10, and extending back 196 feet and 7 inches to Massachusetts avenue; and on that day she, together with her husband, Douglass Maguire, executed a mortgage to the appellant, intending thereby to mortgage said real estate to secure a loan of money to her said husband; that by mistake of the parties and of the scrivener who drew the mortgage, the following description was inserted therein: "All those certain tracts or parcels of land known as part of lot ten (10), in square thirty-seven (37), in the city of Indianapolis, bounded as follows, to wit: commencing at

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*Maguire et al. v. Bissell.*

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the south corner of lot eleven (11), in said square; thence west on south line of said lot eleven (11) one hundred and sixty-three feet and seven inches (163 ft. 7 in.); thence south forty five feet and six inches (45 ft. 6 in.) to the south line of lot ten (10), thence east one hundred and sixty-three feet and seven inches (163 ft. 7 in.) to Delaware street; and thence north forty-five feet and six inches (45 ft. 6 in.) to the place of beginning; also, fourteen feet and six inches (14 ft. 6 in.) off the south side of lot eleven (11), in said square thirty-seven (37), of the city of Indianapolis, being in all sixty (60) feet front, on north Delaware street, by one hundred and sixty-three feet and six inches in depth." That the appellee foreclosed the mortgage, obtained a decree, procured a sheriff's sale, was the purchaser at the sale, and obtained a sheriff's deed, the description as inserted in the mortgage being followed all the time; that afterwards the said Anna R. Maguire and her said husband conveyed all of that part of said lot eleven, from a point one hundred and sixty-three feet and seven inches west of Delaware street to Massachusetts avenue, to one William T. Steele, who is asserting title thereto; that the appellee is the owner of all of said real estate, and that a cloud has thus been cast upon his title, and he asks that his title be quieted.

The third paragraph of the complaint is an ordinary paragraph to quiet title. In it the real estate is described as in the mortgage, except the words "by one hundred and sixty-three feet and six inches in depth" are omitted.

The sufficiency of the second paragraph of the complaint is discussed by counsel for the appellants, and various rulings of the court as to the admission of testimony offered by the appellee on the trial are questioned.

It will be unnecessary for us to consider these various questions if the description which was inserted in the mortgage includes that part of lot 11 conveyed by the Maguires to Steele, for in that event the judgment is right, and should be affirmed, for the reason that the said conveyance cast a

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*Maguire et al. v. Bissell.*

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cloud upon appellee's title which he was entitled to have removed. We will proceed, therefore, to consider the words of description relating to said fractional part of said lot: "Also, fourteen feet and six inches (14 ft. 6 in.) off of the south side of lot eleven (11), in said square thirty-seven (37), of the city of Indianapolis."

The words quoted give a complete and perfect description, and if these are all of the descriptive words, then all difficulty is removed, for it is clear that they describe a fractional part of lot 11, fourteen and a half feet wide, on the south side thereof, and extending along its entire length, and include that part which the Maguires attempted to convey to Steele.

The remaining words are: "Being in all sixty (60) feet front on North Delaware street, by one hundred and sixty-three feet and seven inches in depth."

It is our opinion that these are not words of description, qualifying the words above given, but are to be regarded as words expressing quantity. They apply with the same force to lot 10 as to lot 11. The part of lot 10 which is mortgaged is described by metes and bounds which are definite and certain. It will hardly be contended that these words can have any controlling effect upon the description as given of that lot, or that it was so intended by the parties or the scrivener who drew the instrument.

The description of lot 11 is equally as definite as the description of lot 10, and if the said words do not have the effect to modify or control the one description, it can not be claimed that they modify or limit the other. One illustration will suffice: A. executes a conveyance to B., describing in terms the northeast quarter of the northeast quarter of section 8, town 8, range 8 east, and immediately following the description are these words: "Being twenty acres of land." Evidently the deed would convey all the land included in the congressional description, and the words quoted would be disregarded. In construing the deed these words would be dis-



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Hellebush v. Blake.

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regarded as words of description, but construed as words expressing quantity ; and as descriptive words, when definite and certain, are to be looked to in ascertaining the real estate conveyed by the deed, rather than words expressing quantity only, the words "being twenty acres of land" would have no influence in ascertaining the particular land conveyed by the deed in the case supposed. The case supposed is exactly parallel with the case under consideration.

The number of feet named in the mortgage of the Maguires to the appellee was a less number than the number included in the part of the lot described, but this inaccuracy could not control, modify or limit the quantity included in the words of description, definite and certain as it was.

The appellee, by his sheriff's deed, acquired title to fourteen and one-half feet of ground on the south side of lot 11, block 37, extending from Delaware street to Massachusetts avenue ; therefore, the judgment must be affirmed.

Judgment affirmed, with costs.

ELLIOTT, C. J., took no part in the decision of this case.

Filed May 10, 1889 ; petition for a rehearing overruled June 18, 1889.

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No. 13,551.

HELLEBUSH v. BLAKE.

**RECEIVER.**—*Appointment of.*—*Replevin.*—*Non-Residence.*—The circuit court may appoint a receiver of personal property within its jurisdiction and involved in a pending action, although the defendant may reside in another State.

**SAME.**—*Pending Action.*—*Defective Notice.*—There may be a pending action, so as to authorize the appointment of a receiver, although the notice or service is defective.

119	349
129	379
119	349
149	327
119	349
146	670
119	349
156	582
119	349
157	297
157	299

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Hellebush v. Blake.

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**SAME.—*Special Appearance.***—A special appearance, made for the purpose of moving to quash the notice, constitutes a step in a pending action.

**SAME.—*Power of Appointment.***—Section 1270, R. S. 1881, does not determine the right of the court to appoint a receiver in actions of replevin, but such section must be taken in connection with section 1222, which authorizes the appointment of a receiver, without regard to the form of the action, wherever justice requires it.

From the Howard Circuit Court.

*J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellant.*

*C. E. Hendry and A. C. Bennett, for appellee.*

**ELLIOTT, C. J.**—The appellee sued out a writ of replevin for the personal property in controversy, but, failing to give the undertaking required by the statute, she did not obtain possession. On the 24th day of November, 1886, she applied for the appointment of a receiver to take charge and control of the property, and a receiver was appointed by the judge of the Howard Circuit Court, in vacation. On the 10th day of the following month she caused notice of the appointment of the receiver to be served upon the appellant at his home in Cincinnati, Ohio. On the first day of the December term of the Howard Circuit Court the appellant entered a special appearance and moved the court to quash the notice and set aside the order appointing the receiver. On the same day the appellee filed a motion to reappoint or continue the receiver previously appointed. On the 3d day of January, 1887, the court made an order appointing a receiver and requiring him to give bond and qualify.

The fact that the defendant was a resident of the State of Ohio did not oust the jurisdiction of the circuit court over the personal property in the county of Howard. It is not here a question of the right of the appellee to a personal judgment against the appellant, but the question is as to the right of the court to appoint a receiver to take charge of personal property within its jurisdiction. We are satisfied that the circuit court did have authority to appoint the receiver,

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Hellebush v. Blake.

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notwithstanding the fact that the defendant was not a resident of this State. The property of which the court was asked to take possession through its receiver was within its jurisdiction, and it had authority to preserve and dispose of the property, through the medium of a receiver, in order to prevent its loss or destruction. *Ames Iron Works v. Warren*, 76 Ind. 512; *Quarl v. Abbett*, 102 Ind. 233.

It may be true, as appellant argues, that when the first order was made there was no suit pending and no authority to appoint a receiver, but this point we do not decide, for we are clear that when the second and effective order was made there was an action pending. When that order was made notice had been served, the defendant had appeared, and there was not only an action pending, but the parties were in court. The fact that the defendant had entered a special appearance did not so far abrogate the effect of the notice as to require the circuit court to hold that there was no action pending. His appearance, special though it was, constituted a step in a pending action, and no more was necessary to authorize the court to act than the fact that there was a pending action. There may be a pending action so as to authorize the appointment of a receiver although the notice or service is defective.

If it be conceded that the original order was erroneous, still that would not authorize a reversal, as the second and effective order supplanted it, and no harm came from it to the defendant.

We do not regard section 1270, R. S. 1881, as determining the right of a court to appoint a receiver in actions of replevin, but, on the contrary, our opinion is that the provisions of that section must be taken in connection with the section of the code which confers general authority to appoint receivers. R. S. 1881, section 1222. That section provides that the court may appoint receivers in certain enumerated cases, "And in such other cases as may be provided by law; or where, in the discretion of the court, or the judge

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The Louisville, Evansville and St. Louis Railroad Co. v. Wilson *et al.*

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thereof in vacation, it may be necessary to secure ample justice to the parties." It is difficult to conceive a more comprehensive grant of power than this, and, under this grant, a receiver may be appointed where justice requires it, no matter what the form of the particular action may be. The form of the action does not of itself determine the authority, for, whatever the character of the action, a receiver may be appointed if it is necessary to "secure ample justice to the parties."

Judgment affirmed.

Filed June 19, 1889.

119	352
182	518

119	352
183	08 98

119	352
171	478

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No. 14,584.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD  
COMPANY v. WILSON ET AL.

COMMON CARRIER.—*Bill of Lading.*—*Contract.*—*Merger.*—*Parol Evidence.*—

A bill of lading being both a receipt and a contract, it may, so far as it is in the nature of a receipt, be explained or contradicted by parol; but so far as it is a contract it merges all prior and contemporaneous agreements, and, in the absence of fraud, concealment or mistake, and when free from ambiguity, its terms or legal import can not be explained or added to by parol.

SAME.—*Compensation of Carrier.*—*Stipulation in Bill of Lading.*—*Rule Where Amount of Charge is Omitted.*—*Legal Implication.*—*Previous Oral Contract.*—

Where a bill of lading contains a stipulation as to the amount to be charged for transportation, it is, in the absence of fraud or mistake, conclusive upon the shipper; and where the amount to be charged is not stated in the bill of lading, the law implies as a part of the contract that the carrier shall have a reasonable compensation, such as is commonly or customarily charged others for like services under like conditions, and evidence of a previous oral contract fixing the charge is not admissible.

From the Vanderburgh Superior Court.

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The Louisville, Evansville and St. Louis Railroad Co. v. Wilson *et al.*

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*A. P. Humphrey, A. Gilchrist and C. A. DeBruler*, for appellant.

*J. S. Buchanan, C. Buchanan and W. Hamill*, for appellees.

MITCHELL, J.—Wilson & Chambers, partners, engaged in purchasing and shipping cross-ties used in the construction and maintenance of railroads, sued the appellant railroad company to recover for alleged excessive freight charges paid upon three hundred and fifty-four car-loads of ties shipped over the defendant company's railroad. The plaintiffs allege that the railroad company entered into an agreement with them whereby it became bound to receive and transport to points named cross-ties at the rate of \$14 per car-load; that in pursuance of the agreement so entered into, the defendant company received and transported the number of car-loads above mentioned, but that, in disregard of the contract, it collected \$2,700 in excess of the amount agreed upon from the consignees, and that the latter deducted that sum from the price paid the plaintiffs.

This appeal is from a judgment in favor of the plaintiffs for the full amount claimed in their complaint. The questions for decision arise upon the ruling of the court in overruling the appellant's motion for a new trial.

The evidence tends to show that the plaintiffs were engaged in transporting ties over the defendant's road during the year 1886, and that during that year the rate charged for freight was seven cents a tie, or \$14 per car-load. In the month of December, 1886, the company issued a circular notifying all persons engaged in shipping cross-ties over its line that the rate on freight of that description would be the same as for soft lumber, after January 1st, 1887. It had formerly been less than the soft lumber rate. The plaintiffs received this notice, but they gave evidence tending to prove that after receiving the notice one of the plaintiffs had an interview with the general freight agent of the defendant's

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road, and that upon inquiry the agent said the notice was not intended to apply to the plaintiffs, but only to some other shippers of like freight, whose patronage was not desired, and that the cross-ties of the plaintiffs would be shipped at the old rate of \$14 a car, notwithstanding the notice. It appeared that, under the arrangement thus claimed to have been made, three hundred and fifty-four car-loads of cross-ties were shipped to various points, and that the company collected freight from the consignees at rates ranging from \$17.50 to \$24.50 per car-load. The soft lumber rate over the defendant's road during the same period was about \$23 per car. It appears further that as each lot was shipped bills of lading were delivered to the shipper by the company. The bills of lading for one hundred and sixty-eight cars contained an acknowledgment of the receipt of the number of ties on each car, and specified the weight, and stipulated that the ties were to be transported over the defendant's line of road to the company's freight station at Evansville, and there delivered to connecting lines on payment of freight and charges in par funds. The cars were consigned to the C. B. & Q. R. W. Co., Aurora, Illinois. The column in which the amount to be charged for freight might have been indicated was left blank. The bills of lading for one hundred and eighty-six cars were in all respects similar to those above described, except that they contained a statement of the amount to be paid for freight, the amount inserted being that actually charged. These bills were received, as they were issued, by the plaintiffs without objection.

It is to be observed that the complaint was framed and that the action proceeded to judgment upon the theory that the ties were shipped under an oral agreement, by the terms of which the railroad company bound itself to carry the plaintiff's freight at the rate of \$14 per car-load. The action is to recover for overcharges made in disregard of this agreement. The proof, however, shows, without any contradiction whatever, that the shipments were made—with

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possibly some exceptions, in which cases bills were delivered after the shipments had been made—pursuant to written and printed bills of lading, signed by the company's agent and delivered to the shipper before the transportation began, in each instance.

The question presented at the threshold, therefore, is, was it competent for the plaintiffs, without alleging any fraud, concealment or mistake, to recover upon an oral contract made prior to the issuing of the bills of lading, which are supposed to set forth the terms and conditions upon which the goods were to be transported, or must the rights of the parties be determined by the express terms and legal import of these instruments? A bill of lading is twofold in its character. It is a receipt, specifying the quantity, character and condition of the goods received; and it is also a contract, by which the carrier agrees to transport the goods therein described to a place named, and there deliver them to a designated consignee upon the terms and conditions specified in the instrument. *The Delaware*, 14 Wall. 579; *O'Brien v. Gilchrist*, 34 Me. 554; 2 Am. and Eng. Encycl. Law, 228; *Chandler v. Sprague*, 38 Am. Dec. 404, and note; *Friedlander v. Texas & Pac. R. W. Co.*, 9 Sup. Ct. Repr. 570.

So far as a bill of lading is in the nature of a receipt, or an acknowledgment of the quantity and condition of the goods delivered, it may, like any other receipt, be explained, varied, or even contradicted; but as a contract, expressing the terms and conditions upon which the property is to be transported, it is to be regarded as merging all prior and contemporaneous agreements of the parties, and, in the absence of fraud, concealment or mistake, its terms or legal import, when free from ambiguity, can not be explained nor added to by parol. *Snow v. Indiana, etc., R. W. Co.*, 109 Ind. 422, and cases cited.

“Such a contract is to be construed, like all other written contracts, according to the legal import of its terms.” It becomes the sole evidence of the undertaking, and all ante-

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cedent agreements are extinguished by the writing. Lawson Contracts of Carriers, section 113; *Collender v. Dinsmore*, 55 N. Y. 200; *Southern Ex. Co. v. Dickson*, 94 U. S. 549; *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 174; *Kirkland v. Dinsmore*, 62 N. Y. 171. Thus, in *Snow v. Indiana, etc., R. W. Co.*, *supra*, the shipper of a car-load of horses, who had received a bill of lading in which no route was designated by which the car was to be forwarded after leaving the initial carrier's line, offered to prove that a particular line had been agreed upon. It was held that the silence of the bill of lading in the respect mentioned was the same in legal effect as if a provision had been inserted therein authorizing the first carrier to select, at its discretion, any customary or usual route which was regarded as safe and responsible, by which to forward the car, and that the provision thus imported into the bill of lading was no more subject to be assailed by parol than was any of the express terms of the contract. The cases which affirm this principle are very numerous. They proceed upon the theory that, in the absence of express stipulation, certain terms are or may be annexed to every contract by legal implication, and that stipulations thus imported into a contract become as effectually a part of the written agreement as though they were expressed therein in terms. *Long v. Straus*, 107 Ind. 94; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288; *Hill v. Syracuse, etc., R. R. Co.*, 73 N. Y. 351. Thus, where, in a written contract for the sale of property, no time is fixed for the payment of the purchase-price, the law implies that the price is to be paid upon the delivery or transfer of the property, and the purchaser, without alleging fraud or mistake, would not be heard to prove by parol that the sale was made on credit. An apparent exception to the general rule occurs when proof of an agreement collateral to that contained in the bill of lading is offered: *Baltimore, etc., Steamboat Co. v. Brown*, 54 Pa. St. 77; Lawson Contracts of Carriers, section 115.

As we have seen, all the bills of lading contain a stipula-



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tion to the effect that the cross-ties are to be transported over the defendant's road, and that they are to be delivered as therein specified, upon payment of freight and charges in par funds. In some of them the amount to be paid is not fixed, while in others the charges actually collected were inserted in the bills of lading before they were delivered to the plaintiffs, and before the ties were transported. Surely there can be no ground of recovery where the amount actually collected was stipulated in the bills of lading beforehand. Nor was it competent to give evidence of an oral agreement concerning the amount of freight to be paid, with a view of establishing a right of recovery in respect to those bills of lading in which the amount was not fixed in express terms. The bills of lading must be regarded as complete contracts into which all the oral negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which the goods were to be transported. While it is true, the contract of a common carrier to transport goods is equally binding whether it be by parol or in writing (*Mobile, etc., R. W. Co. v. Jurey*, 111 U. S. 584), no good reason can be suggested in support of a rule which should declare that part of the contract might be in writing, and part, covering the same subject-matter, by parol. Either the bill of lading must be regarded as the sole repository of the agreement of the parties, in respect to the terms upon which the shipments were made, or it must be regarded as a receipt, and nothing more. As a contract, a bill of lading, like other written contracts, is presumed, in the absence of imposition or mistake, to embody the entire agreement of the parties. Lawson *Contracts of Carriers*, sections 112, 113; *Long v. New York, etc., R. R. Co.*, 50 N. Y. 76.

The bills of lading involved in the present case cover every subject of the contract of shipment, except that some of them are silent as to the amount of freight to be paid. If, in the absence of an agreement, the law supplies this term

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by implication, then the writings constitute complete contracts, and parol evidence is inadmissible to vary, control or contradict the terms therein expressed, or those which the law certainly implies. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville, etc., R. R. Co. v. Worland*, 50 Ind. 339; *Pemberton Co. v. N. Y. Central R. R. Co.*, 104 Mass. 144.

The law makes it the duty of every common carrier to receive and carry all goods, seasonably offered for transportation, and authorizes a reasonable reward to be charged for the service. The amount to be paid is, in a measure, subject to the agreement of the parties; but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward, which is to be ascertained by the amount commonly, or customarily, paid for other like services. *Johnson v. Pensacola, etc., R. R. Co.*, 16 Florida, 623; Angell Carriers, section 392; Lawson Contracts of Carriers, section 125.

Whether a railroad company may, in the absence of legislation, agree upon different rates of compensation for similar services for different persons, is a question we need not consider in the present case. *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Spofford v. Boston, etc., R. R. Co.*, 128 Mass. 326; *Ragan v. Aiken*, 9 Lea, 609 (42 Am. Rep. 684).

Without regard to the rights of the shipper and carrier, as they may appear under special contracts, the agreement which the law imports into every bill of lading which does not stipulate the price to be paid for the service is, that the compensation shall be reasonable, and such as is customarily charged others for like service under like conditions. *London, etc., R. W. Co. v. Evershed*, L. R. 3 App. Cases, 1029. This is the contract which the law makes for the parties, and which is imported into every bill of lading which contains no express stipulation covering the subject of the amount to be paid. The conclusion which follows is, that in the absence of an express agreement in respect to the amount to be

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charged written in the bills of lading, the law implies that the amount shall be the reasonable or customary charge. It is neither averred nor proved that the amount collected was unreasonable, or more than the usual or customary charge for like services. The plaintiffs were, therefore, not entitled to recover.

The judgment is reversed, with costs, with directions to the court to sustain the motion for a new trial.

Filed May 8, 1889; petition for a rehearing overruled June 19, 1889.

No. 12,695.

## METZGER v. THE FRANKLIN BANK.

110	350
127	88
119	350
130	530
119	350
134	500

SUPREME COURT.—*Errors.*—*Waiver.*—Alleged errors, which are not discussed by counsel, will be deemed waived.

PRACTICE.—*Objections to Evidence.*—*Must be Specific.*—Objections to the admission of evidence, to be available on appeal, must be specific.

CONTRACT.—*Nudum Factum.*—*No Liability for Non-Performance.*—There is no liability for failing to perform a *nudum pactum*.

SAME.—*Bank.*—*Paying Money to Impostor.*—*Liability.*—M., a real estate agent in Indianapolis, received a letter from Franklin, purporting to be signed by L., who owned certain lots in the former city, and offering to put them in his hands for sale. A correspondence ensued, resulting in M. agreeing to buy the lots. He thereupon caused his bankers to telegraph to the Franklin Bank asking if L. was an honorable man and good for his contracts, but making no inquiry as to the identity of the man claiming to be L., nor was any inquiry of that kind afterwards made. The Franklin Bank answered that it did not know L. On the next day a stranger entered the latter bank, said his name was L., and that he was expecting a deed for him to sign from M.'s bankers in Indianapolis, and the latter were notified. The deed was sent to the Franklin Bank, executed by the person claiming to be L., the consideration paid him

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under instructions from M.'s bankers, the deed sent to them, and their account charged with the amount, and they charged the same to M.'s account. It was afterwards disclosed that the man personating L. was an impostor, and the deed a forgery.

*Held*, that the Franklin Bank had a right to assume that M. knew with whom he was dealing, and as it acted according to instructions and paid the money to the person to whom it was directed to pay it, there is no liability on its part.

From the Shelby Circuit Court.

*F. Winter*, for appellant.

*G. M. Overstreet* and *A. B. Hunter*, for appellee.

BERKSHIRE, J.—This is an action to recover a sum of money which the appellant claims is justly due him from the appellee.

From the examination which we have made of the complaint we are inclined to the opinion that it does not state a cause of action, for the following reasons: 1. If fraud is to be regarded as the gravamen of the action, the facts alleged do not constitute a fraud. 2. If negligence is to be regarded as the foundation of the action, there is no negation of contributory negligence alleged. 3. If the action is to be regarded as resting on a breach of contract, no consideration is alleged. When the action counts upon a contract which rests in parol, before the plaintiff can recover he must allege and prove a consideration. *Higham v. Harris*, 108 Ind. 246; *Wheeler v. Hawkins*, 101 Ind. 486.

The theory of the action seems to be the breach of a parol contract. Unless the appellee undertook to perform, as charged in the complaint, for a consideration of value, we are inclined to the opinion that the appellant must ground his action upon negligence or fraud. But we need not pursue the complaint further, as no question as to its sufficiency is presented by this appeal.

The answer of the appellant was but a general denial; the case was tried by the court, and a special finding made, the law being found favorably to the appellee; the appellant filed

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a motion for a new trial, which was overruled by the court, and, over an exception, judgment was rendered for the appellee. The errors assigned are two in number: 1. The court erred in overruling the motion for a new trial. 2. The court erred in its conclusions of law.

There are three reasons assigned for a new trial: 1. The court erred in receiving and excluding certain evidence. 2. The finding made by the court is not sustained by sufficient evidence. 3. The finding is contrary to law. The action of the court in excluding evidence is not discussed by counsel for the appellant; the first reason therefore is waived that far.

There are five questions and answers, to which the appellant objected, embraced in the first reason assigned in the motion for a new trial. The objections are not available in this court, for the reason that they are not sufficiently specific and definite.

The first objection is that there is no pleading authorizing the evidence, and that it is irrelevant, immaterial and incompetent. The next two are that the evidence is incompetent, irrelevant and immaterial, and the last two are that the evidence is incompetent, irrelevant and immaterial under the issues. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196, and cases cited; *McKinsey v. McKee*, 109 Ind. 209, and cases cited. But we think the testimony was competent as a part of the transaction, unless it be the answer to the first question, which may have been objectionable as being merely hearsay; but, if so, it was wholly immaterial, and could have had no controlling effect in the result of the trial, for it otherwise appears in evidence, if that is a fact of any importance, that the certificate of deposit was not honored until word was received from Fletcher & Co. that the deed was all right.

There is no disagreement in the evidence, except as to two facts, and the court below having found as to these, its finding is conclusive upon this court. The finding of the court is as follows, in substance:

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The appellee was a banking corporation doing business at Franklin, Indiana; one Jonathan L. Lord was a citizen of Rush county, Indiana, and the owner of lots 11 and 12 in in Strong's subdivision of lot 17, in Johnson's addition to Indianapolis. On the 27th of November, 1883, the appellant, who resided in Indianapolis, received by mail from Franklin a letter purporting to be signed by Jonathan L. Lord, referring to the said lots, and proposing to place them in the appellant's hands for sale, he being a real estate agent; thereupon a correspondence sprang up between the appellant and the writer of the letter—the appellant supposing that the writer was Jonathan L. Lord, the owner of the lots—which resulted in an agreement for the conveyance of the lots to the appellant for the sum of \$800. At this point, and on December 1st, 1883, the appellant requested Fletcher & Co., his bankers at Indianapolis, to send to the appellee the following telegram:

“INDIANAPOLIS, IND., Dec. 1st, 1883.

“*R. T. Overstreet, President, Franklin, Indiana:*

“Is John L. Lord an honorable man and good for his contracts.  
S. A. FLETCHER & Co.”

The appellee received this telegram on December 2d, and immediately answered:

“FRANKLIN, IND., Dec. 2d, 1883.

“*S. A. Fletcher & Co., Indianapolis, Indiana:*

“Don't know John L. Lord.

“R. T. OVERSTREET, President.”

This answer was received on December 3d, and immediately communicated by Fletcher & Co. to the appellant. On Monday morning, December 3d, a man, an entire stranger to all the officers, came into the appellee's bank and said to the president and cashier that his name was Jonathan L. Lord; that he was expecting a deed to be sent down from Indianapolis and asked if it had come; he was informed that the mail had not come yet, to come in again after awhile. After the arrival of the mail he came again, but was informed that

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no deed had come. Thereupon the appellee's cashier telephoned S. A. Fletcher & Co., at Indianapolis, as follows:

"A man is in the bank who says his name is Jonathan L. Lord, and that he has an arrangement with you by which you are to send a deed for him to sign."

After receiving this message Fletcher & Co. sent for the appellant and communicated it to him, and at his request answered the appellee by telephone that he would at once send the deed by mail.

The appellant at once prepared a deed to himself for the lots, to be executed by Jonathan L. Lord and wife for a consideration of \$800, and handed the same to Fletcher & Co., together with his check for \$800, and at his request, on said 3d day of December, they transmitted said deed to the appellee, enclosing the following letter with it:

"December 3d, 1883.

"*R. T. Overstreet, Pres.*—We enclose deed for Mr. and Mrs. Lord to sign and acknowledge, and when done please pay them \$800 and charge our account. If Lord claims expense of telegram and notary fees for acknowledgment, in addition to the \$800, pay them and charge our account, and advise us. When the deed is executed and money paid please send it to us.

Yours respty.,

"S. A. FLETCHER & Co."

On the morning of December 4th the letter and deed were received, and soon after the man who had inquired for the deed came in and took it away, but shortly came back with it (it purporting to have been signed by Jonathan L. Lord, and acknowledged before a notary public) and delivered it to the appellee, and thereupon the appellee placed to his credit the sum of \$800, and executed and delivered to him the following statement:

"Deposited with the Franklin Bank, Franklin, Indiana, by Jonathan L. Lord, December 4th, 1883, — dollars — cents currency. Check —, \$799.20, payable on acceptance of deed by A. Metzger, of Indianapolis."

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This was done without identification or other knowledge of the party than his own statements. Immediately thereafter appellee transmitted the deed to Fletcher & Co., together with the following letter :

“ FRANKLIN, IND., Dec. 4th, 1883.

“*S. A. Fletcher & Co., Indianapolis, Ind. :*

“ We enclose herewith a deed executed by Jonathan L. Lord. Mr. Lord is an unmarried man, his wife having died last September. We have charged your account with \$800.

“ Yours respty., E. C. MILLER, *Cash'r.*”

The statement in the letter as to Lord's wife being dead rested entirely upon what the person said who was personating Lord. Fletcher & Co. received the letter and deed and delivered the deed to the appellant, who accepted it, believing from what was stated in the letter that Lord's wife was dead.

On the 5th of December this same man, who claimed to be Jonathan L. Lord, came to the appellee's bank, and at his instance the appellee, by telephone, inquired of Fletcher & Co. if they had received the deed, and if it was all right, and whether it should pay the money? Fletcher & Co. answered that it was all right, and that they had given the appellee credit for \$800, and thereupon this man, claiming to be Lord, checked from the appellee's bank the sum of \$800. At the end of the month of December, Fletcher & Co. settled with the appellee, and paid the said sum of \$800. The appellant also settled his account with Fletcher & Co., in which he was charged with the said sum of \$800, and gave them credit for it. The man who presented himself to the appellee as Jonathan L. Lord, and who signed and executed the said deed by that name, was not Jonathan L. Lord, and was not the owner of said lots, and had no right or authority to sell or convey the same, or to receive the said money therefor, and on his part the whole transaction was a fraud and forgery.

The real Jonathan L. Lord was, at the time of said trans-



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action, a married man and had no knowledge of said transaction and received no part of said money.

The forgery of said deed was not discovered until February, 1884, and the appellant then, on the demand of said Lord, for the purpose of removing the cloud that had been cast upon his title to said lots, executed to him a quitclaim deed for the same.

The court came to the conclusion that the law was with the appellee, for the reason that both parties had been guilty of negligence. We are satisfied that the court reached the proper conclusion, whether it gave the proper reason therefor or not.

It nowhere appears in the special finding that the appellee was to receive compensation for its services. The conclusion must be, therefore, that it was not, and if not, then the undertaking of the appellee was a *nudum pactum*, and there is no liability for a failure to perform the contract as charged in the complaint. But did not the appellee transact the business intrusted to it in accordance with the instructions received, and pay the money to the person that the appellant intended should receive it? We are of the opinion that it did. The appellee assumed and had the right to assume that the appellant knew Jonathan L. Lord. The first telegram that passed between the parties indicated that—"Is John L. Lord an honorable man and good for his contracts." No question of identity was inquired for, but traits of character. But the appellee's telegram in reply was sufficient to put the appellant upon inquiry as to the fact of identity, but it seems not to have done so. The next communication that passes is a telephonic message from the appellee to Fletcher & Co.: "A man is in the bank who says his name is Jonathan L. Lord, and that he has an arrangement with you by which you are to send a deed for him to sign," and still no inquiry came from the appellant as to the identity of the man, but instead, a communication by telephone was returned, stating that the deed would be forwarded by mail at once; the deed

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was forwarded, together with instructions for the appellee to pay the consideration when Lord and wife executed the deed.

We think, under the circumstances, it would have been but an act of presumption on the part of the appellee to have supposed for a moment that the appellant did not know the man with whom he was negotiating. But whether so or not, the appellant was bound to know that he was dealing with the right man, and can throw the responsibility on no one else, unless he engaged the services of some one else to identify the person with whom he was negotiating.

The following is the statement of the case of *Western Union Tel. Co. v. Meyer*, 61 Ala. 158 (32 Am. Rep. 1): The action was brought to recover money paid defendant for a telegraphic money-order. Meyer received, through defendant's telegraphic line, a dispatch from Cincinnati, signed "Max Reis," supposed to be from his nephew, who was then on his way from New York to Selma, to the effect that he had lost his ticket and money between Cincinnati and Pittsburgh, and desired plaintiff to send him at the latter place forty dollars by telegraph immediately. This was done, the defendant giving the following receipt: "Received from Joseph Meyer forty dollars, to be paid to Max Reis at Cincinnati, Ohio." The defendant, on the same day, handed over the money in Cincinnati to the person who sent the dispatch to the plaintiff, who was not known to the company's agent or identified as a person whose name was "Max Reis," and who proved to be an impostor, and not the plaintiff's nephew. MANNING, J., delivering the opinion, said: "My brothers think that where there is nothing to create suspicion in the minds of the company's agents, it is for the party on whom the demand is made, to ascertain for himself whether he who makes it is the person he professes to be, and that the company has no right to refuse payment of the money to him in reply to whose message the order to pay it was sent. I was strongly inclined to the other conclusion. But the case is a new one, and I defer to their opinion."

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That was a much stronger case than the one at bar in favor of the plaintiff. There was an undertaking on the part of the defendant, for a valuable consideration, to deliver the money to Max Reis. The following is the opinion of the court, in *Dunbar v. Boston, etc., R. R. Co.*, 110 Mass. 26, pronounced by CHAPMAN, C. J.: "The plaintiff sold the gin and whisky which are the subject of this action to a person calling himself John H. Young of Providence, and delivered them to the defendants to be carried to the same person in Providence by the same name. As he was the only person in Providence who bore that name, there was no other individual to whom the defendants could deliver the property. A delivery to him would be a performance of the contract. The fact that he was known to the delivery clerk as John F. Gorman, made it necessary for him to conceal from the clerk the fictitious name, and to pretend that he was acting as an agent or servant of John H. Young. He was thus enabled to obtain the property, but by means of this deceit, the property reached the person to whom the plaintiff sold and consigned it. Thus the contract of the defendants was performed in its spirit and letter, and the plaintiff has no cause of action against them."

We take the following extract from the opinion of MORTON, C. J., in *Samuel v. Cheney*, 135 Mass. 278: "The plaintiff contends that he intended to send the goods to Arthur Swannick. It is equally true that he intended to send them to the person with whom he was in correspondence. We think the more correct statement is, that he intended to send them to the man who ordered and agreed to pay for them, supposing erroneously that he was Arthur Swannick. It seems to us that the defendant, in answer to the plaintiff's claim, may well say, we have delivered the goods entrusted to us according to your directions, to the man to whom you sent them, and who, as we were induced to believe by your acts in dealing with him, was the man to whom you intended to

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send them ; we are guilty of no fault or negligence.” *Alexander v. Swackhamer*, 105 Ind. 81.

There can be no doubt but that the money which the appellee paid over to the man who was personating Jonathan L. Lord was paid to the man to whom the appellee was directed to pay it, and the man for whose benefit the appellant drew his check upon Fletcher & Co.

This is a very different case, and different principles rule, than in the case of the payment of a check to the wrong person by a bank in due course of business.

We have examined the evidence, and find that it supports the finding of the court, and that, in no view that can be taken of the case, is the judgment of the court wrong.

The judgment is affirmed, with costs.

Filed June 19, 1889.

No. 13,780.

THE CITY OF GOSHEN v. ENGLAND.

**JUROR.**—*Action against City.—Taxpayer Incompetent.*—In an action against a city for damages resulting from an injury caused by a defective street or sidewalk, the fact that a juror is a resident taxpayer of the city is cause for challenge.

**SAME.**—*Service Within Year.—Cause for Challenge.*—It is cause for challenge that one called as a juror has served in that capacity during the year immediately preceding. Section 1395, R. S. 1881.

**SAME.**—*Regular Panel.—Vacancy.—Presumption that Juror is Talesman.*—Unless it appears that one, not drawn as a member of the regular panel, and who has been serving during the term as a juror, was placed upon the jury by the direction of the court as a member of the regular panel, to fill a vacancy, it will be presumed that he was a talesman, and subject to challenge under section 1395, R. S. 1881.

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**BILL OF EXCEPTIONS.—Evidence.**—Where the record shows that time was given for filing a bill of exceptions, and that a bill, containing the evidence, and properly certified as required by section 1410, R. S. 1881, was filed within the time allowed, the evidence is in the record.

**NEGLIGENCE.—Damages.—Broken Leg.—Second Surgical Operation.—Suffering and Deformity.**—In an action against a city to recover damages for a broken leg caused by a defective sidewalk, it is proper to show that on account of the nature of the injury, which is described, it became necessary during the treatment of the limb to break and reset the bones after the first operation was performed, that the treatment was necessary and skilful under the circumstances, and that the suffering endured by the plaintiff and the deformity of the limb were the results of the injury.

**SAME.—Character of Fracture.—Testimony of Surgeon.**—A surgeon who has examined an injury may testify as to the character of the fracture and as to what bones were broken.

**SAME.—City.—Defective Sidewalk.—Notice of.—Prior Accidents to Other Persons.**—Evidence that other persons, prior to the accident to the plaintiff, had stepped into the hole in the sidewalk which caused the injury sued for, is competent as tending to show that the city had notice of the dangerous condition of the walk. It is also proper to show that the defect was afterwards repaired.

**SAME.—Attending Physician.—Statements in Absence of Patient.**—A physician may not testify as to statements made to him, in the absence of the plaintiff, by the latter's attending physician, concerning the character of the injury suffered by the plaintiff.

**SAME.—Aggravation of Injury by Plaintiff's Negligence.—Reduction of Damages.—Burden of Proof.**—Where, in an action to recover for a personal injury, the plaintiff shows the receipt of the injury, and that it was caused by the negligence of the defendant, without contributory negligence on his part, the burden is then upon the defendant to show, if such is the fact, that the injury was aggravated by the plaintiff's negligence in its treatment, and if such fact is established it merely goes to a reduction of the damages in proportion to the negligent aggravation.

From the Elkhart Circuit Court.

*I. A. Simmons, H. D. Wilson and W. J. Davis, for appellant.*  
*J. H. Baker and J. H. Defrees, Jr., for appellee.*

OLDS, J.—This is an action brought by Ann England, appellee, against the city of Goshen, appellant, for damages sustained by reason of the negligence of the appellant, and without fault of the appellee. She caught her foot in a hole

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in a sidewalk, in the city of Goshen, and thereby broke her limb. Issue joined, trial, verdict and judgment for five hundred dollars.

The error assigned and discussed is, the overruling of the motion for a new trial. The first cause of complaint is, sustaining appellee's challenge of John Lehman, a juror, for the cause that said juror resided in the city of Goshen and paid taxes on personal property therein.

It has been held by this court, and is now the settled law of this State, that in an action against a city for damages resulting from an injury received by reason of a defect in a street or sidewalk, the fact that a juror is a resident taxpayer of the city is a good cause for challenge of such juror. *Town of Albion v. Hetrick*, 90 Ind. 545, 549 and 550; *Hearn v. City of Greensburgh*, 51 Ind. 119.

In the case of *Williams v. City of Warsaw*, 60 Ind. 457, an action to recover the penalty for the violation of an ordinance prohibiting the keeping of gaming tables and allowing minors to play thereon, some decisions of the courts of other States are cited by the court in support of the theory that in an action of that character the fact that a juror is a taxpayer of the city is not cause for challenge, but the question is not decided in that case, and our decisions are uniform in holding this to be good cause for challenge. The court also sustained appellee's challenge to Fuller, as a juror. Fuller was called by the sheriff as a talesman, and he had served on the jury in the same court as a talesman in another cause some days previous and at the same term of court. This ruling of the court was proper. Section 1395, R. S. 1881, makes it unlawful for an officer charged with the selection of a panel of petit jurors to select any person to serve as such a juror who has served as a juror during the year immediately preceding, and provides that such fact shall be cause for challenge. *Barber v. Hine*, 54 Ind. 542.

It is further contended that the court erred in sustaining the challenge of the appellee to the juror William Kyte.

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From the examination of Kyte, touching his competency, it appears that there was one of the regular panel of the jury absent, and that this juror was placed upon the jury in the place of such absent juror, and that he had served as a juror on the trial of causes at the term of court up to the empanelling of the jury in this cause. It does not appear from the record that the court ordered the vacancies in the regular panel to be filled by persons to be selected by the sheriff, and that the jurors thus selected should constitute a part of the regular panel for that term. If such fact appeared from the record, it would thus present the questions discussed by counsel, that there was an absent juror, and that the juror Kyte was selected by the sheriff by the order of the court to constitute a regular juror for the term, and that he was thereby a regular juror, and not subject to be challenged on the ground that he had served as a juror during that term of court. It is contended that, under section 1396, R. S. 1881, if for any cause the jury is not present at any term of the court, it is lawful, and made the duty of the court, to order the sheriff to summon a jury from the bystanders, which shall constitute the regular panel for the term; and that the jury consists of twelve jurors, and if any juror is not present it is made the duty of the court, under said section, to order the panel filled from the bystanders, and when so filled it shall constitute the regular panel, and that such was the fact at this term of the court, and Kyte was placed on the jury and constituted one of the regular panel.

We do not think the record presents the question as contended by counsel for appellant. If the court has the power as contended for, it is necessary for the court to make an order, or at least direct, that the sheriff fill the panel from the bystanders, and the record does not show that any such order was made or direction given by the court and executed by the sheriff. In this case it is simply shown by the examination of the juror that he was placed upon the jury by the sheriff as one of the regular panel; it does not show that it

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was done by order or the direction of the court, and he could not, at least, constitute one of the regular panel of jurors except by the order or direction of the court, so that the question as presented shows the juror Kyte to be nothing more than a talesman. The court having sustained the challenge, it will be presumed that the challenged juror was not a part of the regular panel, and the challenge was properly sustained. It does not appear that the appellant sustained any injury by the rulings of the court in sustaining the challenges to jurors, and the challenges were evidently sustained in the effort to get a fair jury. *Carpenter v. Dame*, 10 Ind. 125; *Heaston v. Cincinnati, etc., R. R. Co.*, 16 Ind. 275 (279).

The next question presented is upon the admissibility of evidence, and it is contended by counsel for appellee that the evidence is not in the record, and therefore no question can be considered relating to the evidence, but in this counsel are in error. The evidence is incorporated into a bill of exceptions, and the record shows that time was given for the filing of such bill of exceptions, and that it was filed within the time allowed, and is properly certified, as required by section 1410, R. S. 1881.

Counsel assign as error various rulings of the court in the admission of evidence. The first complained of is question ten in the original examination of Scott England, husband of the appellee, who had testified as to having learned of his wife's injury, going to her assistance and taking off her shoe, and as to the doctor setting her foot; he was then asked: "Do you know what was the matter with it?" to which question there was an objection; the grounds of the objection are not stated. The objection was overruled, an exception taken, and the witness answered: "I think it was broken."

There was no error in this ruling, even if the grounds of the objection had been stated. The witness was then asked if anything was done to the foot after it was first set, and he answered that it was broken and reset, and as to what position her foot was in before it was rebroken, and he de-



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scribed it. He was then asked whether the hole in the sidewalk was repaired, and he answered that it was ; also, whether the ankle was rebroken more than once, and he answered, only once. And he was then asked what was done, if anything, toward straightening the limb, and how many times, and he answered, four or five times. He was also asked, whether his wife suffered during the time, and he answered, she did.

It was alleged in the complaint that in the treatment of said fractured limb it became necessary, twice, to break and reset her ankle, and it was contended by the plaintiff that the tendons drew her foot out of place, and made it crooked, and turned it awry, and with skilful treatment it could not be retained in its normal shape and position, and the evidence as to the condition of the limb, and breaking and resetting the same was proper. It is not contended but that the appellee exercised reasonable care and skill in the selection of physicians and surgeons to treat her. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 ; 2 Thompson Negligence, 1091, section 7 ; *Rice v. City of Des Moines*, 40 Iowa, 638.

It was proper, also, to show that the defect in the sidewalk was afterwards repaired. The appellee was entitled to compensation for the pain and suffering endured, and it was proper to prove that she suffered pain during the necessary treatment of the limb. 2 Thompson Neg., 1258 ; *Pittsburgh, etc., R. W. Co. v. Sponier*, 85 Ind. 165.

The appellee, while testifying as a witness, was asked, "What is the fact as to your foot being reset at different times?" which was objected to on the ground that when the fractured limb was once adjusted, or the dislocated joint once reduced, the appellee had no right to show that it was reset, or reduced a second time ; the objection was overruled and the witness answered that "the tendons would draw it crooked, and they would straighten it again, and then I would have severe pain in it and it would draw crooked again." This was proper evidence. It is proper, in a case of this character, to

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show the manner in which the limb was treated, and that it was proper treatment under the circumstances. The condition of the patient and the injury are proper to be taken into consideration, and it may be shown, if such are the facts, that the injury was of such a nature as that, with the use of ordinary skill and the usual and proper appliances, it could not be kept in position, and had to be readjusted; or that the injury was of such a character, or the condition of the patient was such, as that appliances to keep the limb in place could not be used, and that the treatment adopted in the case was proper and skilful under the existing circumstances, and the suffering endured and the deformity which followed were the necessary results of the injury.

Objection is made to Dr. Wickham testifying as to the character of the fracture, and as to what bone was fractured. It was clearly admissible for a surgeon who had examined the injury to testify to the character of the fracture, and as to what bones were broken.

Mrs. Coutts testified to having assisted the appellee into the house on the occasion of her receiving the injury, and she was then asked as to what was the fact as to what the appellee did; as to whether she was able to put her foot down on the ground, to use her foot, and as to the fact of the witness and her father-in-law helping the appellee into the house, and as to whether appellee put her foot to the ground at the time; to which questions appellant objected, the objection was overruled, and the witness testified that appellee could not put her foot down to the ground to use it, and she could not help herself. This evidence was proper.

Mrs. Albright testified to being acquainted with the condition of the sidewalk at the place where the injury occurred, and was then asked: "You may tell the jury what, if anything, ever happened to you, or anybody with you, in passing over that walk previous to the accident to Mrs. England." Counsel for defendant objected for the reason that the witness had already testified that she knew what was there. The

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objection was overruled and the witness permitted to answer. The question is not objected to on the ground of the incompetency of the evidence, but counsel concede its competency, and the objection is not sufficient to present any question as to the competency of the evidence sought to be elicited in answer to the question. The witness testified that her daughter, while passing along the walk, had several times got her foot in the hole into which Mrs. England stepped, and would have fallen if the witness had not held her up. This evidence was competent to show the city had notice of the dangerous condition of the sidewalk. *City of Delphi v. Lowery*, 74 Ind. 520.

Dr. Cornell was the surgeon who treated the appellant immediately after the injury, and the defendant called Dr. Latta as a witness and offered to prove by Dr. Latta that he had a conversation with Dr. Cornell, while he was treating the appellee, in the absence of appellee, and Dr. Cornell said there were no bones broken, but there was simply an injury of the ligaments. The plaintiff objected, and the testimony was excluded. The ruling of the court was correct. This evidence was not at all competent.

The next alleged error complained of was the giving of instruction number seven. This instruction is as follows:

“If you find for the plaintiff you must state in your verdict the amount of damages to which she is entitled. This amount should be a full and just compensation for the injury she received, and no more. In estimating such compensation you may consider any bodily pain and suffering and illness that may have resulted from the injury, and the pain, anxiety and distress of mind, if any, she suffered by reason thereof, or by reason of any medical treatment that became necessary for her to undergo; the extent and character of the injury, and whether or not it is permanent; and also the amount, if any, which she has paid from her own separate means for medical treatment or services. But you should not allow her anything for the value of her time, or services as a laborer

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or housekeeper, nor for the value or cost of her care or support during the time of her illness. These things her husband is bound to furnish, and for them, he, if any one, may recover. It is claimed by the defendant the pain and suffering of the plaintiff has been increased, and the injury she received has been aggravated and made worse than it otherwise would have been, by her own negligence and carelessness of her limb since the injury, and, if the limb is permanently disabled, that it is due alone to such negligence and careless conduct, and not to the original injury. If such facts are proved by a fair preponderance of the evidence, you should not allow the plaintiff any compensation for such increased pain, suffering or aggravation of the injury so caused by her own negligence or carelessness. But if the plaintiff called reputable and reasonably competent physicians to treat the injury, the amount of her compensation should not be reduced by reason of any wrong treatment the physicians may have given or administered, and if she followed their directions in her conduct and use of her limb, she can not be charged with negligence or carelessness, even if such conduct or use were not proper, and aggravated the injury."

This charge is objected to for the reason, it is claimed, that it puts the burden of proof on the defendant of establishing the fact that the injury was aggravated by the negligence and carelessness of the plaintiff.

The court, in its third instruction, told the jury that "The burden is upon the plaintiff to prove by a fair preponderance of the evidence the material facts alleged in her complaint, and she can not recover unless it is shown by a fair preponderance of the evidence that there was a dangerous place in the walk, and the plaintiff was injured by reason thereof, without her own fault or negligence contributing thereto," etc.

If the plaintiff established by a preponderance of the evidence that she received the injury, without her own fault or negligence contributing thereto, and the other facts necessary to entitle her to recover, it would follow that she

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was entitled to recover for the damages resulting therefrom. If she employed a physician, the presumption would be that he was a reasonably skilful one, and that she followed his instructions, and that whatever pain she suffered and deformity followed were the natural outgrowths of the injury sustained. It will not be presumed that she did a wrong, that she tortured herself, aggravated the wound and produced the deformity which exists. When the plaintiff introduced evidence proving the receipt of the injury, and that it occurred by reason of the negligence of the defendant and without her fault or negligence contributing thereto, that she employed skilled physicians and surgeons to treat it, and showing the deformity existing, she established a cause for the pain she suffered and the deformity existing, and thereby established a right to recover the damages she had sustained; and if the defendant, to relieve itself from such liability, asserted that the pain and deformity were not the result of the injury, but were caused by the negligence of the plaintiff in the treatment of the limb after the injury, the necessity or burden rested upon the defendant to establish the truth of such assertion. It was a new element brought into the case by the defendant.

This court has universally held that the plaintiff can not recover damages for an injury where, by his negligence, he contributed to it; that if the injury resulted from the joint negligence of the plaintiff and defendant there can be no recovery; and that it is necessary for the plaintiff to aver and prove that the injury occurred without fault or negligence on the part of the plaintiff, the burden being upon the plaintiff, to entitle him to recover, to establish that he was free from contributory negligence, or that the injury is in no degree attributable to any want of care on his part. The rule is otherwise in a majority of the States, but that is not the question presented in this case. It is here claimed that the negligence of the plaintiff contributed, not to the cause, but to the aggravation, of the injury, and is certainly not an

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element which the plaintiff should be required to prove to entitle her to recover, but it is clearly a matter of defence, and the burden of proving it should rest upon the defendant. Nor do we think it should bar a recovery, but there should be an apportionment of the damages and the defendant held liable only for such damages as his negligence produced. *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551; Beach Con. Neg., p. 73, section 24; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; 1 Shearman & Redfield Neg. (4th ed.), sections 107, 108, 109; 2 *Id.*, section 741; *Bardwell v. Town of Jamaica*, 15 Vt. 438; 2 Thompson Neg., p. 1162, section 13; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Gould v. McKenna*, 86 Pa. St. 297.

The instruction in this case stated, in effect, that the plaintiff was not entitled to recover for any pain, anguish or deformity produced by her negligence in the treatment of the limb; that if she, by her negligence in the treatment of the limb, had increased the pain, suffering and deformity, she could not recover for such increased pain, suffering and deformity produced by her own negligence, but before there could be any reduction of the damages for the pain and suffering actually sustained, and the deformity actually existing, it must appear by a preponderance of the evidence in the case that the pain, suffering and deformity were increased by the negligence of the plaintiff. We think there was no error in the seventh instruction in this respect.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed June 19, 1889.

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Ungericht v. The State.

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119	379
125	134

No. 14,688.

## UNGERICHT v. THE STATE.

119	379
170	190

**CRIMINAL LAW.**—*Desecration of the Sabbath.*—*Work of Necessity.*—*Barber.*—*Shaving Customer on Sunday.*—Whether the shaving of a customer, by a barber, on Sunday is a work of necessity, within the meaning of the exception contained in the statute prohibiting the desecration of the Sabbath, is a question of fact for the determination of the jury, under proper instructions from the court.

From the Marion Criminal Court.

*J. L. Griffiths* and *A. F. Potts*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

**COFFEY, J.**—This was a prosecution by the State against the appellant, instituted before the mayor of the city of Indianapolis, for desecration of the Sabbath.

The affidavit charges that John Ungericht, late of said city and county, on the 18th day of March, 1888, at the city and county aforesaid, was then and there found unlawfully at common labor, and engaged in his usual occupation and avocation, to wit, that of a barber, and being then and there engaged in shaving one Jacob C. Yuncker, at and for the price of fifteen cents, such common labor, work and avocation not being then and there a work of charity or necessity, and the said John Ungericht being then and there a person over fourteen years of age, and not a person who conscientiously observed the seventh day of the week as the Sabbath, nor a traveller, nor a family removing, nor the keeper of a toll-bridge or toll-gate, nor a ferryman acting as such, and the said 18th day of March, A. D. 1888, being the first day of the week, commonly called Sunday.

The appellant was convicted before the mayor, and upon appeal to the criminal court he was again tried and convicted,

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and now appeals to this court, and assigns as error that the criminal court erred in overruling his motion for a new trial.

Section 2000, R. S. 1881, is as follows: "Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor; or engaged in his usual avocation (works of charity and necessity only excepted), shall be fined in any sum not more than ten nor less than one dollar; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates, and ferrymen, acting as such."

It is earnestly contended by the appellant that the matter of shaving is a work of necessity, and that, therefore, it falls within one of the statutory exceptions, and that he is not liable to criminal prosecution for performing such work of necessity on Sunday.

Many legal definitions of the word "necessity" are to be found in the authorities, but the following from the Chicago Legal News (vol. 12, p. 44) seems to give the result of all the authorities upon the subject: "The law contemplates that the community has a general need that all should rest on Sunday; most of the affairs and doings of week-day are less important than this need of a rest-day; but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental occupation during others; to nurse and heal the sick; to provide prompt burial of the dead—these and some other objects are superior to the need of general repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than its day of rest."

It is perfectly clear, however, that the word "necessity," as used in the statute, is incapable of an accurate and comprehensive definition. Any attempt by the courts to frame



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a definition of general application would be more likely to produce confusion than certainty. The question in each case must be decided according to the circumstances, and is, therefore, more a question of fact than of law. *Mueller v. State*, 76 Ind. 310. In this case it is said: "What does necessity, as used in this law, mean? It may be said, as has been said before, that it does not mean an absolute or physical necessity, but a moral fitness or propriety of the work or labor done, under the circumstances of any particular case. *Morris v. State*, 31 Ind. 189. Generally speaking, it ought to be an unforeseen necessity, or if foreseen, such as could not reasonably have been provided against."

It was held more than fifty years ago that the matter of shaving customers was not a work of necessity, and, therefore a violation of the law prohibiting the desecration of the Sabbath. *Phillips v. Innes*, 4 Cl. & Fin. 234; Bishop Stat. Crimes, section 245.

• In the case of *State v. Frederick*, 45 Ark. 347, the court says: "The indictment needed not to allege that it was not a work of necessity or charity. The court will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute."

In the cases of *Commonwealth v. Jacobus*, 1 Pa. Leg. Gaz. 491 (15 Cent. Law Jour. 145), and *Commonwealth v. Williams*, 1 Pears. 61 (15 Cent. Law Jour. 145), it was held that a barber who shaves persons on Sunday in a public shop is guilty of Sabbath-breaking.

In the case of *Commonwealth v. Jacobus*, *supra*, the court says: "But is it a work of necessity? Many persons shave themselves on that day, who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonorial parlor" at ten o'clock on Sunday morning; but the court thought that made no difference, and added: "If the closing of these shops on Sundays is an in-

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convenience to the public, the remedy rests with the Legislature, and not with the court.”

But it is held by this court that it must be left to the jury, as a question of fact, to determine, under proper instructions from the court, what particular labor, under the circumstances, would constitute a work of necessity. *Edgerton v. State*, 67 Ind. 588.

In this case the question was submitted to a jury, under proper instructions from the court, as to whether the shaving of Yuncker, under the circumstances, constituted a work of necessity. The jury found against the appellant upon that question. We can not say that their verdict is not supported by the evidence. The court, therefore, did not err in overruling the motion for a new trial.

Judgment affirmed.

Filed June 19, 1889.

119	383
119	495
119	382
143	492
119	382
155	4
119	382
158	172



No. 13,391.

119	382
170	529

**THE BURNSVILLE TURNPIKE COMPANY v. THE STATE, EX REL. MCCALLA.**

**MANDAMUS.—Corporation.—Transfer of Stock.**—Mandamus will lie to compel the officers of a corporation to make a transfer of stock in its books where the petitioner has a clear legal right, and no other adequate remedy, but the writ will not lie where the petitioner's claim rests merely on an equitable right.

**SAME.—Turnpike Company.**—A corporation can not be compelled by mandate to do that which it would have no authority to do voluntarily; and as a turnpike company has no power to transfer upon its books one person's stock to another without the production of a written assign-

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ment, power of attorney or other proof of title, mandamus will not lie to compel it to do so.

From the Bartholomew Circuit Court.

*G. W. Cooper* and *C. B. Cooper*, for appellant.

*J. C. Orr*, for appellee.

MITCHELL, J.—This was an application by the relator, McCalla, for an alternative writ of mandate to compel the appellant turnpike company, by its officers, who are made parties, to transfer four shares of the capital stock of the company, upon its books, to the relator. The case was put at issue and trial by the court, in the first instance,—the relator having demanded a jury—and a finding and judgment in favor of the company entered. This judgment was reversed upon appeal to this court, on the ground that the case was triable as a civil action at common law, and that the court below had committed error in denying the relator's motion for a jury trial. *State, ex rel., v. Burnsville Turnpike Co.*, 97 Ind. 416.

The cause having been remanded it was afterwards tried by a jury, the trial resulting in a verdict and judgment for the relator. Waiving intermediate questions, the merits of the appeal may be disposed of by considering the evidence.

It was an uncontroverted fact that the turnpike company, on the 13th day of August, 1879, issued and delivered to Mary E. Davis a stock certificate, in which it was recited that she was entitled to four shares of the capital stock of the corporation, which were transferable on the books of the company upon the surrender of the certificate. The four shares were duly entered on the books of the company, in the name of Mrs. Davis. The relator testified that he had subsequently purchased the stock absolutely from her, and had paid for it according to agreement, and that she had delivered the certificate over to him, but had refused to make an assignment of it in writing. Her claim was that the stock had been delivered to the relator in pledge, or under

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some conditional arrangement under which she was entitled to reclaim it. It also appeared that the relator had offered to surrender the certificate to the company at its office, and that he demanded that the stock should be transferred to his name on the books of the company. This the company refused to do. There was much other testimony relevant to the matter in issue, some of which tended to show that Mrs. Davis had sold the stock to the turnpike company after it had been delivered over to the relator. Conceding the facts to be, in every particular, as claimed by the relator, and that the attempted sale to the corporation conferred upon it no right to the stock, as against the relator, the question arises whether or not, on the case as made, mandamus will lie to compel the transfer of the stock on the books of the company. It is regarded as an open question in many jurisdictions whether mandamus is a proper remedy, in any case, to compel the officers of a corporation to execute a transfer of corporate stock. 1 Morawetz Corp., section 215. Where, by the charter or by-laws of a corporation, it is made the duty of the officers of the corporation to enter the transfer of shares in the books of the company, we can perceive no principle upon which it can be maintained that mandamus will not lie in a proper case to compel the officers to perform their duty. Accordingly it was held in *Green Mount, etc., Turnpike Co. v. Bulla*, 45 Ind. 1, that where stock certificates have been duly assigned the officers of the company may be compelled, upon the surrender of the certificates, to make the proper transfer. See, also, *State, ex rel., v. First Nat. Bank, etc.*, 89 Ind. 302. The remedy, although partaking of the qualities and attributes of a civil action, is nevertheless regarded as of an extraordinary character, the writ being the highest known to our laws. The rule is, therefore, thoroughly established, that it only issues where there is a clear, specific legal right to be enforced, and where there is no other available and adequate remedy. Speaking upon this subject, an elementary writer says: "The right which it is sought to

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protect must therefore be clearly established, and the writ is never granted in doubtful cases." High Ex. Leg. Rem., sections 9, 10. The remedy being strictly legal, it can not be resorted to by an equitable assignee of stock, even though the right to the transfer may be clear. 1 Morawetz Corp., section 215.

On the relator's behalf, it is argued that in the absence of a statute or by-law of a corporation requiring certificates of stock to be assigned in writing, the delivery of the certificate to the purchaser will be sufficient to vest in him the equitable title to the stock. This we concede. But we are not aware that any court has carried the doctrine to the extent of holding that mandamus will lie to compel a corporation to transfer stock to a party whose claim rests merely on an equitable right. Such a holding would impose upon the officers of a corporation the peril of deciding between the equity of one who had possession of a stock certificate and the rights of another who had the legal title. This would violate the rule that mandamus will only lie where there is a clear legal right.

Section 3637, R. S. 1881, declares, among other things, that "Any person becoming a shareholder by assignment of stock shall succeed to all the rights and liabilities of his assignor." The term "assignment," as employed in the above section, indicates "a transfer by writing, as distinguished from one by delivery." Bouvier Law Dict.

While it is true the statute makes stock in a turnpike company personal property, it is nevertheless personal property of that incorporeal character which requires a written assignment, or a transfer upon the books of the company, in order that the legal title thereto may be transferred. *Koons v. First National Bank, etc.*, 89 Ind. 178; *Weyer v. Second Nat. Bank, etc.*, 57 Ind. 198; *Platt v. Hawkins*, 43 Conn. 139. The written assignment of such property performs the same office that the delivery of possession of corporeal

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property does in respect to transferring the legal title. *State, ex rel., v. First Nat. Bank, supra.*

It would be a palpable violation of legal duty on the part of the officers of a corporation to transfer the stock of one person, on the books of the company, to another, without the production of proof of authority to do so. That proof must be made either by a written assignment, power of attorney, or in some other way which indicates that the person seeking the transfer has the title. The corporation can not be compelled by mandate to do that which it would have no authority to do voluntarily.

The court below seems to have proceeded, from first to last, upon the erroneous theory that mandamus might be resorted to in order to compel the transfer of the stock without a written assignment. This was a fundamental error.

The judgment is reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed March 5, 1889; petition for a rehearing overruled June 19, 1889.

119	386
121	44
122	21
123	468
123	518

119	386
141	628
119	386
145	458

119	386
149	136
151	147

119	386
158	486

119	386
167	66

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No. 14,902.

### HOVEY, GOVERNOR, v. THE STATE, EX REL. RILEY.

**CONSTITUTIONAL LAW.—*Practical Exposition.***—Practical exposition given to constitutional provisions which are not entirely clear and free from doubt, is of controlling force.

**SAME.—*Practical Exposition Merely Establishes a General Principle.***—Practical exposition does not give rights in particular cases; it merely establishes a general principle.

**SAME.—*State Benevolent Institutions.***—Legislature may Appoint Officers of.—

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Hovey, Governor, v. The State, *ex rel.* Riley.

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Under the Constitution, and the effect which has been given it by practical exposition, the Legislature may appoint the governing officers of all the benevolent institutions of the State, or, at its option, authorize their appointment by some other department of the government.

**SAME.**—*Particular Qualifications of Officers.—Legislature may Prescribe.*—The offices relating to the State's benevolent institutions are not such as every elector may claim a right to hold, solely on the ground that he is a voter, but the Legislature may restrict them to competent persons by prescribing particular qualifications.

**SAME.**—*State's Property.—Control of.*—The Legislature has general authority over the property of the State, and it may appoint agents or officers to manage such property; the benevolent institutions are the property of the State, and are within the control of the Legislature.

BERKSHIRE, J., and COFFEY, J., dissent.

From the Marion Circuit Court.

*L. T. Michener*, Attorney General, *J. H. Gillett* and *A. C. Harris*, for appellant.

*J. E. McCullough* and *L. P. Harlan*, for appellee.

**ELLIOTT, C. J.**—The central question which this record presents is this: Is the relator, by virtue of his appointment by the General Assembly of the State, entitled to the office of trustee of the institution for the education of the blind? In our judgment he is.

That there is a class of officers that may be appointed by the General Assembly can not now be justly denied, and the only question which is still open to debate is, what officers belong to this class? It is our judgment that, in view of the provisions of the Constitution and the effect given them by practical exposition, the governing officers of all of the benevolent institutions of the State may rightfully be appointed by the General Assembly.

The Constitution contains provisions which, if they do not do more, do at least supply color for the claim of the right of the General Assembly to appoint the governing officers of the benevolent institutions of the State. It is neither necessary nor proper for us to decide as to the general extent of the legislative power to appoint to office, except in so far

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as it is incidentally involved in the disputed right to the offices of the class claimed by the relator. We are not here confronted with any question as to the right to a local office, or to a general administrative office, for here we have a controversy involving offices of a peculiar nature, the duties of which relate exclusively to institutions that it is made the duty of the Legislature to establish and maintain.

As there is some warrant in the Constitution for the claim of the legislative right to appoint the governing officers of the benevolent institutions, it is our duty to ascertain what practical exposition has been given to the Constitution, and if we find a principle established by long continued practice, we must yield to it, unless we are satisfied that it is repugnant to the plain words of the Constitution. We are far from asserting that the plain provisions of the Constitution may be broken down or overleaped by practical exposition, but what we do assert is, that where, as here, there are provisions not entirely clear and free from doubt, practical exposition is of controlling force.

Our own and other courts have time and time again adjudged that practical exposition is of controlling influence wherever there is need of interpretation. The language employed by the courts is strong, and the current of opinion is unbroken. In speaking of the effect of a practical exposition, it was said by an able court that: "It has always been regarded by the courts as equivalent to a positive law." *Bruce v. Schuyler*, 4 Gilm. 221. In adhering to long continued exposition, another court said: "We can not shake a principle which in practice has so long and so extensively prevailed." *Rogers v. Gooden*, 2 Mass. 478. But it is unnecessary to quote the expressions of the courts, for harmony reigns throughout the whole scope of judicial opinion upon this subject. *Board, etc., v. Bunting*, 111 Ind. 143; *Weaver v. Templin*, 113 Ind. 298, 301; *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *Ogden v. Saunders*, 12 Wheat. 213, 290;



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*Minor v. Happersett*, 21 Wall. 162; *State v. Parkinson*, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. Board, etc.*, 100 Ill. 495; *State v. French*, 2 Pinney (Wis.), 181.

Practical exposition establishes a principle. Particular instances fall within general rules, and practical exposition establishes general rules for the government of particular instances. Practical exposition does not give rights in particular cases, since to give it that effect would create an evil as great as that of class legislation, and against that evil is directed some of the strongest provisions of our Constitution. Courts must search for the general principle which practical exposition establishes, and, when that principle is discovered, apply it to all cases within its legitimate sweep. The science of jurisprudence is not made up of particular instances, nor can it be so constructed, for, if it be a science at all, it must be composed of principles. To us it is clear that what we have here to do is to find what principle has been established, and under that principle bring the particular instance.

The principle which the long continued practice has established is, that the General Assembly has the power to appoint the governing officers of all of the benevolent institutions, or, at its option, authorize their appointment by some other department of the State government. This is the effect of the practice, and it is narrowing the effect of this practical exposition much beyond what reason and authority justify, to hold that it applies to some of the institutions and not to the others. We can not believe that the General Assembly may rightfully appoint the trustees of the hospital for the insane, and yet have no authority to appoint those of the institution for the education of the blind. That the General Assembly has power to appoint trustees of the latter institution has been expressly decided, and practical exposition has also asserted the same thing. The practice establishes a principle, if it establishes anything, that principle applies to a class of officers, and within that class are the officers of all

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of the benevolent institutions of the State. It is impossible to conceive why the General Assembly may not appoint the officers of all the benevolent institutions if it may, as it is settled it may do, appoint the officers of one. The principle is the same in the one instance that it is in the other, and the class embraces all of the officers of the different institutions.

The decisions of this court either expressly decide or tacitly concede that some appointing power is vested in the General Assembly. *Collins v. State, ex rel.*, 8 Ind. 344; *State, ex rel., v. Harrison*, 113 Ind. 434; *State, ex rel., v. Denny*, 118 Ind. 382; *Hovey v. State, ex rel. Carson, post*, p. 395. The practice which we assume constitutes a practical exposition, is, therefore, one recognized by all the departments of the government, and is of unusual strength. It is so strong that we can not do otherwise than yield to it, so that, without deciding what effect the provisions of the Constitution should have independently of practical exposition, we must decide that, under the operation of this practical exposition, they must be deemed to authorize the appointment of the governing officers of the benevolent institutions, since this practical exposition establishes a general principle which must govern all cases that legitimately fall within its operation.

The power to appoint, or to direct the appointment of, officers embraced in the class to which the one here in controversy belongs, has been exercised by the General Assembly ever since the adoption of our present Constitution. At the time that Constitution was adopted this was the practice, and of this practice the framers of that instrument had knowledge. Instead of embodying in the present Constitution provisions against the practice, those who framed it placed in it provisions giving the practice substantial recognition, and we can not, at this late day, assert that the practice persisted in for so many years was in violation of constitutional provisions. They did not, at all events, materially change the former Constitution in this particular, although they did essentially change it as to other classes of officers. The

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claim of legislative power has not been made, it is important to keep in mind, in a few scattered instances, or in a broken and disjointed course, but it has been made and enforced in many instances, and with uninterrupted uniformity.

We have suggested that the office is a peculiar one, and we may add that it is one which it is evident the Constitution did not intend should be filled by the electors of the State at a general election. It is, as it seems to us, an office which may properly be regarded as within the control of the General Assembly, the control belonging to that body as an incident of the right to establish and maintain benevolent institutions. *Hovey v. State, ex rel. Carson, supra.* But we need not decide what would be the effect of the constitutional provisions had there been no long continued usage, for there was such usage and it gave the effect to the provisions that we here assign them. The general delegation of power to the General Assembly may have been with much reason considered as carrying with it, as an incidental power, the right to appoint officers to manage and conduct the State institutions. Such certainly is the force the usage has affixed to those provisions. Offices of the class under immediate mention are not such as every elector may justly claim a right to hold solely on the ground that he is a voter and all voters are entitled to hold offices, but they are offices which the Legislature may restrict to competent persons by prescribing what shall be the qualifications of those who enter them. It is within the authority of the Legislature, by virtue of its general power, to require that the officers of this class shall be selected from different political parties, or that they shall be persons of peculiar skill and experience. It may, indeed, provide for the appointment of women to this class of offices, as has been done in some instances. If we are wrong in affirming that, in this class of offices, the Legislature may prescribe particular qualifications, then the practice of all the departments has been in many instances a persistent violation of the Constitution.

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Another consideration, not without importance and one that is to be regarded in construing the Constitution and giving effect to its provisions, is, that the benevolent institutions are the property of the State, and as such within the general control of the Legislature. As the Legislature has general authority over the property of the State, and as it may appoint agents or officers to manage that property, there is a solid foundation for the practice which has so expounded the Constitution, or aided in expounding it, as to give the General Assembly the power to appoint the governing officers of the benevolent and other State institutions. The basis of the practice is the familiar principle that the grant of a principal power carries with it all necessary subsidiary powers.

Judgment affirmed.

BERKSHIRE, J., dissents for the reasons stated in *City of Evansville v. State, ex rel.*, 118 Ind. 426. COFFEY, J., also dissents.

Filed May 18, 1889; petition for a rehearing overruled June 20, 1889.

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No. 14,923.

THE STATE v. BURNETT.

**CRIMINAL LAW.—Affidavit.—Motion to Quash.—Agreement as to Grounds of Objection.**—An agreement between the prosecuting attorney and the counsel for the accused as to what objection is made to the affidavit, can not be regarded, and if the affidavit is bad it will be so held, without reference to the ground upon which the motion to quash is rested.

**SAME.—False Representations.—When not Criminal.**—A criminal prosecution can not be based upon false representations which are not of such a character that a man of common understanding is justified in relying upon them.

From the Lake Circuit Court.

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The State v. Burnett.

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*L. T. Michener*, Attorney General, *C. N. Morton*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

*J. B. Peterson*, for appellee.

BERKSHIRE, J.—This is an appeal by the State, as provided in section 1882, R. S. 1881. The court below quashed the affidavit, and the only question presented for our consideration is as to the correctness of that ruling.

There is an agreement on file, signed by the attorney for the appellee and the prosecuting attorney, stating that the only objection made to the affidavit was that the false representations charged were not such as might deceive a man of common intelligence.

We can not regard the agreement; if the affidavit was bad for any reason, whenever a motion to quash it was presented it was the duty of the court to sustain the motion, without reference to the ground upon which the defendant's attorney rested his motion.

We are of the opinion that the affidavit was bad, for the reason that the false representations charged were not such as a man of common understanding was justified in relying upon, and because the representations consisted principally in expressions of opinion, and not of existing facts.

Counsel for the State contend that as to whether the representations were calculated to deceive was a question of fact, and not of law. The correctness of counsel's position depends upon the manner in which the question arises; as a question of evidence it is a question of fact, but as a question of pleading it is a question of law. The authorities to which our attention has been directed are not in opposition to the rule as we have stated it. We do not care to set out the affidavit, or even its substance.

Judgment affirmed.

Filed June 18, 1889.

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The State, *ex rel.* Wahl, v. Marsh *et al.*

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No. 13,717.

THE STATE, EX REL. WAHL, v. MARSH ET AL.

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130 428

SUPREME COURT.—*Record.—Omission of Evidence.—Questions Not Considered.*—Where the record does not contain all of the evidence, questions depending upon the evidence will not be considered.

From the Clark Circuit Court.

*J. B. Meriwether* and *M. Z. Stannard*, for appellant.

*J. H. Stotsenburg*, for appellees.

OLDS, J.—This is an action on a guardian's bond. The only error assigned is the overruling of the appellant's motion for a new trial. The causes for a new trial set forth in the motion are, that "the finding of the court is contrary to the evidence," and "the finding of the court is contrary to law."

By the bill of exceptions it appears that the files and judgment of Applegate v. H. R. Carr *et al.*, and a note and mortgage were introduced in evidence, and it further appears that the files are lost; and the clerk of the Clark Circuit Court, at the request of the attorneys for appellant, inserted in the bill of exceptions the entry on the judgment docket in a case of Rebecca Applegate v. Hezekiah R. Carr *et al.*, and the clerk certifies to the record in the case that "the above and foregoing is a full, true and complete transcript of all pleadings filed pertaining to said cause, except the papers in an action wherein Rebecca Applegate was plaintiff, and Hezekiah R. Carr *et al.* were defendants, referred to in the bill of exceptions, and which said files are missing and can not be found in my office."

From this it affirmatively appears that the bill of exceptions does not contain all the evidence, and the case can not be considered on the evidence. *French v. State, ex rel.*, 81 Ind. 151; *Shimer v. Butler University*, 87 Ind. 218; *Collins v.*

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*Collins*, 100 Ind. 266; *Hendrix v. Rieman*, 90 Ind. 119; *Thames Loan, etc., Co. v. Beville*, 100 Ind. 309; *Lawrenceburgh, etc., Co. v. Hinke*, *ante*, p. 47.

There is no question presented to this court by the record. Judgment affirmed, with costs.

Filed May 16, 1889; petition for a rehearing overruled June 19, 1889.

No. 14,846.

HOVEY, GOVERNOR, v. THE STATE, EX REL. CARSON.

**CONSTITUTIONAL LAW.—*Legislative Power.—Enactment of Laws.***—The authority of the Legislature in the enactment of laws is subject to no restrictions except such as are imposed by the Constitution of the State, the Constitution of the United States, and the laws and treaties made in pursuance thereof.

**SAME.—*Statute.—Construction of.***—A statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of the enactment.

**SAME.—*Appointment to Office.—Power.—Executive Department.***—While the appointment to office is in its nature an executive act, the exclusive right to exercise the power of appointment is not included in the general grant of power to the executive department.

**SAME.—*Power of Appointment.—By whom May be Exercised.***—The general power to choose, elect or appoint officers is not inherent in the executive or any other branch of the government, but is a prerogative of the people, to be exercised by them or by those departments of the government to which it has been either expressly or by necessary implication confided or reserved in the Constitution, and neither the people nor those to whom the power has been confided can exercise such power except in conformity with the Constitution and the laws enacted in pursuance thereof.

**SAME.—*Law Enjoined by Constitution.—Force of.***—A law enacted in obedience to and in execution of the express command of the Constitution, which

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119	300
121	44
122	20
122	468
119	305
141	284
119	395
151	266
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156	188
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168	642

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is not in palpable violation of some express constitutional provision, is of as high sanction as though it were found in that instrument.

**SAME.**—*Hospital for Insane.—Legislature May Appoint Officers of.*—As the Constitution enjoins upon the Legislature the duty to make provision by law for the support and maintenance of an institution for the treatment of the insane, this is equivalent to an express grant of authority to provide for the selection of all such agents or officers as that body may deem necessary to accomplish the duty imposed, and it may either appoint such officers or agents itself or commit the power to do so to the Governor.

**SAME.**—*Settled Construction of Provision.—Readoption in New Constitution.—Effect of.*—Where a constitutional provision has received a settled judicial construction, or a uniform legislative exposition, which has been acquiesced in by the other departments and the people, and such provision is afterwards incorporated in a new Constitution, it will be presumed that it was adopted with knowledge of the construction it had previously received, and the courts will adhere to such construction.

**SAME.**—*Power of Appointment.—Practical Construction of Constitution.*—As the Legislature, with the acquiescence of the people and the other departments, uniformly construed the similar provisions of the old Constitution and of the new to confer upon it the power to appoint the trustees for the State hospital for the insane, that construction is now conclusive, and can not be questioned.

**SAME.**—*Authentication of Act.—Absence of Governor's Signature.—Presumption.*—Where an act, which does not have the signature of the Governor, is certified by the legal custodian, and is properly authenticated and complete in form, judicial investigation is at an end, the conclusive presumption being that the act became a law in some constitutional method, without the approval, or notwithstanding the disapproval, of the Governor.

**SAME.**—*Extraneous Facts not Admissible.*—The validity or proper authentication of an act can not be brought in question by instituting an inquiry of fact into matters extraneous to the act itself.

From the Marion Circuit Court.

*L. T. Michener*, Attorney General, *J. H. Gillett*, *A. C. Harris*, *W. H. Calkins*, *F. Winter*, *R. O. Hawkins*, *C. F. Griffin* and *W. L. Taylor*, for appellant.

*J. E. McCullough* and *J. T. Hays*, for appellee.

**MITCHELL, J.**—The judgment from which the present appeal is prosecuted requires the appellant, as Governor of the State of Indiana, to issue to the relator, Joseph L. Carson,



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a proper commission as one of the trustees of the Indiana Hospital for the Insane. The affirmance or reversal of this judgment depends almost wholly upon the answer that shall be given to the inquiry whether or not the General Assembly is, or can be, under the Constitution, invested with the power to appoint trustees for the government of the various benevolent institutions of the State. The relator affirms the existence of the power, and that it has been duly exercised in his appointment, while the Governor challenges the power of the General Assembly to make the appointment, and asserts, moreover, that the law under which the relator was appointed was not constitutionally authenticated, and for that reason never became a valid enactment.

It may aid in arriving at a proper conclusion to recur briefly to the legislative history of the benevolent institutions of the State, so far, at least, as it relates to the hospital for the insane. The Constitution under which the State government was organized in 1816, made it the duty of the General Assembly "to provide one or more farms, to be an asylum for those persons who, by reason of age, infirmity, or other misfortunes, may have a claim upon the aid and beneficence of society." Sec. 4, art. 9. Pursuant to the duty thus enjoined, the General Assembly, by an act approved January 13th, 1845, created a board, consisting of three commissioners, who were named in the act, and who were directed to select and purchase a suitable tract of land upon which to locate a "State lunatic asylum." They were authorized to receive subscriptions and donations, and to advertise for plans and receive proposals for the erection of suitable buildings, and were required to report to the General Assembly at its next meeting. On January 25th, 1847, five commissioners were appointed by the General Assembly to succeed those previously appointed. By an act approved February 15th, 1848, it was declared that there should be six commissioners of the Indiana Hospital for the Insane, whose term of service should be six years from the date of their appointment, "to be

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elected by the joint *viva voce* vote of the General Assembly.” This latter act, which prescribed the duties of the commissioners, and made provision for the government of the institution, was in force during the session of the constitutional convention and when the revised Constitution adopted in 1851 took effect. Section 1 of article 9 of the present Constitution reads as follows: “It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf and dumb, and of the blind, and, also, for the treatment of the insane.”

The first Legislature that assembled after the revised Constitution was adopted, in obedience to the mandate above set out, enacted laws providing for the support and government of the benevolent institutions of the State. It was provided that six commissioners of the hospital for the insane were to be elected by the joint vote of the General Assembly, three of whom were to serve two years, and three four years, and until their successors were elected by the General Assembly. These commissioners were entrusted with the general control and management of the hospital. They were authorized to appoint a superintendent, matron, and such assistant physicians, stewards and other officers as were necessary to take charge of the patients and hospital, and for the efficient administration of the affairs of the institution. Act approved January 15th, 1852, 1 G. & H., p. 378.

From the initiatory step in the organization of a hospital for the insane in 1845, until the adoption of the present Constitution, and from thence until the enactment of the law approved March 6th, 1879, under various statutes, the General Assembly appointed the commissioners or trustees, as they are called interchangeably, of the hospital for the insane of the State. The act last above named conferred the power on the Governor, by and with the consent of the Senate, to appoint trustees, but this last act was repealed in February, 1883, when it was again provided that the trustees should be elected by the General Assembly. By the act of

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March 5th, 1889, under which the present controversy has arisen, some changes were made in the plan for the constitution and organization of the several boards, and provision was made as before for the election of the trustees by the joint vote of the General Assembly. Under the provisions of this latter act the relator claims to have been elected. It thus appears that from the organization of the hospital for the insane of the State, under the old Constitution and the new, every Legislature that has assembled, with possibly two exceptions, has, without challenge hitherto, asserted the right to create boards and appoint officers for the government of this institution.

The constitutional power of the General Assembly having been challenged by the chief executive of the State, the duty now rests upon the court to consider the questions involved, with that degree of caution and deliberation which their magnitude and the abiding consequences which depend upon their proper solution imperatively demand. Representing one of the co-ordinate departments of the State government, acting under the solemn sanction of official obligation, and realizing that the duty which confronts the court is no less than that of sitting as arbiter to determine a question of power in contention between the General Assembly and the chief executive, representing, respectively, and under equally solemn sanctions, the other great departments of the government under which we live, we are admonished that the gravity of the situation is such as demands our most thoughtful and dispassionate consideration.

At the outset, it is to be remembered, that the authority of the Legislature in the enactment of laws is subject to no restrictions, save only those imposed by the Constitution of the State, the Constitution of the United States, and the laws and treaties made in pursuance thereof; that in construing a statute it is to be done with a view to uphold it, if that is fairly possible, and that if it be of doubtful constitution-

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ality, the doubts are to be resolved in favor of the enactment. *Beauchamp v. State*, 6 Blackf. 299; *Hedderich v. State*, 101 Ind. 564.

That feature of our State Constitution, which is conspicuous in the organic law of every State of the Union, as well as in the Constitution of the United States, and which distributes all governmental powers into three departments, is appealed to as a foundation for the argument against the power of the General Assembly to make the appointments in question. Article 3 of the Constitution divides the powers of government into three separate departments—the legislative, the executive, including the administrative, and the judicial, and it declares that “no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.” Taking this general distribution of powers among the different departments as a basis, and relying upon those provisions of the Constitution which vest the executive, legislative and judicial powers, respectively, in the Governor, the Legislature and the courts, the argument by which the invalidity of the law is sought to be maintained, following general definitions of what constitutes executive, legislative and judicial power, is to this effect: The power to make appointments to office is essentially and intrinsically an executive function; legislative power is the power to enact, alter and repeal laws; while judicial power is the power to construe and interpret the Constitution and laws, and to render judgments and make decrees determining private controversies. Hence, while it is not explicitly asserted, the conclusion to which the argument, if it be well founded, necessarily leads is, that the appointing power is an executive prerogative, which can not be interfered with or exercised by the General Assembly or any other department of the government in the absence of express authority to that end.

It is universally regarded as one of the chief excellences

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of our system, that the departments of government are required to be separate, and that the several branches are, in most respects, practically independent of each other. It has accordingly become an established rule of constitutional law that where general power has been confided to, or vested in, one department of government, persons entrusted with power in another department will not be permitted to encroach upon the power of, nor exercise functions which pertain and are appropriate to, the other department, unless the authority to do so is conferred in express terms, or unless the exercise of the power becomes necessary and appropriate in order to discharge other constitutional duties and functions expressly committed to it. *Kilbourn v. Thompson*, 103 U. S. 168; *People v. Keeler*, 99 N. Y. 463. It is a fundamental error, however, to assume that the exclusive right to exercise the power of appointment is included in the general grant of power to the executive. The Federal Constitution declares, with emphasis, that "The executive power shall be vested in a President of the United States," but it was never supposed that this declaration invested the President with the appointing power, which, after long and earnest debate, was conferred upon the chief executive of the nation in express terms. Section 1, Art. 2, U. S. Const.

That the powers of government are separated into legislative, executive and judicial, and are confided to different departments, and that powers committed to one department can not be exercised by persons performing functions in any other, are, as we have seen, well established features of our system. The boundaries which separate the functions of the different departments are broad, clear and distinct as applied to matters affecting property rights, or private concern, or the execution or enforcement of existing law; but it is not easy, where the Constitution is silent, to discriminate or formulate definitions as to what constitutes legislative, executive or judicial authority, when questions of public policy,

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or which relate to the best means and agencies for accomplishing a governmental end or of executing the law are involved. "There is," said COOLEY, J., in *People v. Hurlbut*, 24 Mich. 44 (93), "no such thing as drawing between legislative and executive power such a clear line of distinction as separates legislative from judicial; and the Legislature, in prescribing new rules, have necessarily a large discretion as to whether the agencies for putting them in force shall be named by themselves or left to the selection of the executive." *State v. Hawkins*, 44 Ohio St. 98; *Fletcher v. Peck*, 6 Cranch, 87 (136); *Wynhamer v. People*, 13 N. Y. 378.

Upon this subject the same eminent authority on constitutional law said: "The authority that makes the laws has large discretion in determining the means through which they shall be executed. \* \* \* Such powers as are specially conferred by the Constitution upon the Governor, or upon any other specified officer the Legislature can not require or authorize to be performed by any other officer or authority. \* \* \* But other powers or duties the executive can not exercise or assume except by legislative authority." Cooley Const. Lim. (5th ed.), p. 135.

The same author, speaking of the exercise of the appointing power, as being an executive act, uses this language: "Where the Constitution contains no negative words to limit the legislative authority in this regard, the Legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution." Cooley Const. Lim. (5th ed.), p. 136, note.

Respecting appointments to office, at least so far as the question now before us is concerned, the Constitution, as we shall see, has not left the former to be ascertained by inference or abstract definition.

It has been repeatedly affirmed, and it is doubtless true in a sense, that an appointment to office is in its nature intrinsically an executive act, but it by no means follows that the power of appointment may not be confided to other depart-

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ments than the executive, unless it has been specially conferred upon that department or denied the other. *Taylor v. Commonwealth*, 3 J. J. Marsh. 401; *Achley's Case*, 4 Abb. Pr. 35; *State v. Barbour*, 53 Conn. 76.

An examination of the cases in which expressions in relation to the nature of the act of appointment similar to those above are found, will disclose that no court has ever asserted that the right to make appointments to office was inherently and exclusively an executive prerogative, without regard to some express constitutional provision or legal enactment conferring the power; on the contrary, whenever the subject has been considered, with a view to its practical application to cases in hand, it has been held that the executive has no power of appointment to public office, except as it may relate to those who assist in the discharge of his personal executive duties, beyond such as is expressly conferred by the Constitution and the laws enacted in obedience thereto, and that the Constitution and the laws which confer the power measure the extent of executive authority in that respect. *Mayor v. State*, 15 Md. 376; *State v. Swift*, 11 Nev. 128; *State v. Irwin*, 5 Nev. 111; *Commonwealth v. Hanley*, 9 Pa. St. 513; *Collins v. State, ex rel.*, 8 Ind. 344.

The Constitution and laws furnish the only rule, and are the charter, by which the Governor's authority in that respect is to be determined. *Field v. People*, 2 Scam. (Ill.) 79. Accordingly, in *Collins v. State, ex rel., supra*, in which an act of the Legislature, creating the office of attorney general, and providing for the election of that officer by joint ballot of the General Assembly, was involved, it appeared that after passing the act the Legislature adjourned without filling the office as therein provided. The office being vacant, the Governor assumed the right to fill it by appointment. It was held, however, that the executive power of appointment was defined and limited by the Constitution and laws, and that, in the absence of any express power to that end, the appointment was void. Other authorities to the



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same effect might be cited, but the foregoing are deemed sufficient to establish the proposition that the appointing power is not essentially and exclusively inherent in the executive department, and hence that the assertion of such power by a co-ordinate department of the government did not result in an encroachment upon the authority of the executive.

Our first conclusion, therefore, is, that the general power to choose, elect or appoint officers is not inherent in the executive, nor in any other branch of the government, but that it is a prerogative of the people, to be exercised by them, or by those departments of government to which it has been either expressly or by implication confided or reserved in the Constitution, and that neither the people nor those to whom the power has been confided can exercise the power, except in conformity with the Constitution and the laws enacted in pursuance thereof. *People v. Hurlbut*, 24 Mich. 44; *Commonwealth v. Baxter*, 35 Pa. St. 263; *People v. Mathewson*, 47 Cal. 442; 6 Am. & Eng. Encyl. of Law, p. 294.

The Constitution provides specifically the manner in which certain officers are to be chosen; with reference to those not therein provided for, it directs that they shall be chosen as may be prescribed by law. That was the command of the people concerning a right inherent in them.

If the organic law of the State were silent concerning the method of selecting officers whose appointments were not otherwise provided for in the Constitution, it would then be necessary in each case to solve the question by construction, and by considering whether the duty or power in each particular case pertained to the legislative, the executive or the judiciary. But confining ourselves strictly to the case before the court, we assert that the power to appoint agencies for the government of the hospital for the insane is not left to inference, but is expressly conferred upon the General Assembly. As we have already seen, the Constitution in the most explicit terms enjoins upon the General Assembly the



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duty to make provision by law for the support and maintenance of this institution. The solemn obligation thus imposed was laid directly upon that body, and it was left absolutely untrammelled as to the means and agencies which it should employ in executing the high command of the people. The laws enacted from time to time are, therefore, to be regarded as having been passed in obedience to the constitutional behest, and, as is said in *State v. Marlow*, 15 Ohio St. 114, "This legislation being not merely permitted, but enjoined by the Constitution, has, in effect, the same high sanction as though it formed a part of that instrument." Thus, where it was provided by the Constitution that the General Assembly should provide by law before what authority and in what manner the trial of contested elections should be conducted, it was held that an act which provided that cases involving contested elections, where the officers were of a certain class, should be tried by the Senate, was within the discretionary power of the Legislature, and it was declared that the authority to ascertain facts, and to apply the law to the facts when ascertained, a function in its nature judicial, might be conferred upon other departments of the government than the judicial. *State v. Harmon*, 31 Ohio St. 250; *State v. Hawkins*, *supra*. It follows necessarily, if it is within the discretion of the General Assembly, in the enactment of a law commanded by the Constitution, or which relates exclusively to matters of political concern, to confer power of a judicial character upon the Senate, as in one of the cases cited, and upon the chief executive, as in the other, it may under like circumstances provide by law for the exercise of functions of an executive character by the Legislature.

Accepting as correct the proposition that a law enacted in obedience to and in execution of the express command of the Constitution, which is not in palpable violation of some express constitutional provision, is of as high sanction as though it were found in that instrument, the further conclusion follows that the command of the Constitution

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which enjoined upon the General Assembly the duty to provide by law for the support of the benevolent institutions, was equivalent to an express grant of authority to provide for the selection of all such agents or officers as that body should deem necessary to accomplish the duty imposed. Having been thus authorized, the manner of selecting the agencies for the government of these institutions, as provided by the Legislature, is not now open to question by any other department of the government.

Another consideration of a controlling character leads to the same conclusion as that stated above. The General Assembly was charged with the duty already described, and the only constitutional provision outside of what is implied in the section imposing the duty for choosing or appointing agents or officers for the government of the benevolent institutions is the following: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." Section 1, article 15, Constitution.

While it is conceded that the above section authorized the General Assembly to prescribe by law the manner in which the offices here in question should be filled, the contention is that it was not competent nor within legislative discretion to vest the right of appointment in the General Assembly, but that it was essential to the validity of the law that the appointment of trustees should have been confided to the Governor, or to some other executive or administrative officer or board. This position is not maintained by any authority that is at all applicable. The decision in *State v. Kennon*, 7 Ohio St. 546, may be conceded to be a correct exposition of the law, in view of the fact that the Constitution which controlled the judgment of the court in that case, in express terms provided that no appointing power should be exercised by the General Assembly, whereby, as was in effect said by the court in that case, the appointing power by that body was "cut up by the roots." Similar constitutional pro-

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visions control the judgments in *People v. Bledsoe*, 68 N. C. 457, and *People v. McKee*, 68 N. C. 429.

Instead of grants of power to the General Assembly, the controlling element in those cases is that the appointing power was conferred upon the executive, and expressly prohibited to the Legislature. It is a reasonable and well established rule, applicable to the interpretation of a constitutional provision, not only to consider the sense in which those who framed it are supposed to have understood the language employed, but to consider whether a similar provision in the preceding Constitution had received judicial or legislative construction at the time of the adoption of the latter. When a constitutional provision has received a settled judicial construction, or a uniform legislative exposition, which has been acquiesced in by the other departments of government and by the people, and is afterwards incorporated into a new or revised Constitution, the presumption will be indulged that it was retained and adopted with knowledge of the exposition which it had previously received. In such a case courts will feel constrained to adhere to the construction which the provision had theretofore received, and with which it was presumably readopted. *Moers v. City of Reading*, 21 Pa. St. 188; *Ex Parte Roundtree*, 51 Ala. 42; *Cronise v. Cronise*, 54 Pa. St. 255; *People v. Wright*, 6 Col. 92; *Mayor v. State*, 15 Md. 376; *Davis v. State*, 7 Md. 151; *Cooley Const. Lim.* 73. Applying this rule, what follows? Section 8, article 4, of the Constitution of 1816 declares, after providing for certain appointments to be made by the Governor, that "all offices which may be created by the General Assembly, shall be filled in such manner as may be directed by law." As we have already seen, the State benevolent institutions were organized while the Constitution of 1816 was in force. Acting under the authority which it was supposed the above provision supplied, the General Assembly uniformly, with the acquiescence of the people and of all the other departments of government, appointed com-

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missioners to control these institutions. The General Assembly "directed by law" that the commissioners for the government of these institutions should be appointed by the General Assembly. This was the practical legislative exposition which the old Constitution had uniformly received, and which was presumably known to the framers of the new, and in view of which the corresponding section in the revised Constitution was adopted. Note the respect in which the old provision was changed before being incorporated into the new Constitution. The appointing power theretofore lodged in the Governor was omitted, or eliminated, and the section was made to read: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." Section 1, article 15.

Trustees of the hospital for the insane are officers for whose appointment no provision was made in the Constitution. They are neither county, township nor municipal officers, who were elective or chosen in any other manner at the time the Constitution was adopted. On the contrary, as we have seen, they were officers who, according to the method existing at the time the Constitution took effect, were appointed by the General Assembly. That was the prescribed method *then* existing, as well as that uniformly since prescribed by law. This must, therefore, be regarded as conferring express authority and unlimited power upon the General Assembly to use its discretion in providing for, or prescribing the manner of, the appointment of officers such as those here in question. *People v. Bennett*, 54 Barb. 480; *Ohio v. Covington*, 29 Ohio St. 102; *Walker v. City of Cincinnati*, 21 Ohio St. 14; *State v. The Judges*, 21 Ohio St. 1.

The absolute, unlimited power of prescribing the manner of selecting officers of the class here involved was vested by the people in the General Assembly. If any doubt remained concerning the power of the General Assembly to make the appointments in the manner prescribed by the law in question,

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it would be the duty of the court, before resolving the doubt against the validity of the solemn enactment of a co-ordinate department of the government, to resort to the interpretation uniformly given to the above provision, contemporaneous with and subsequent to its incorporation into the present Constitution. As we have seen, before, contemporaneous with, and uniformly, with the exception of four years since, the General Assembly has, without question or challenge, asserted and exercised the right to appoint the officers who should have the government of these State institutions. *State, ex rel., v. Harrison*, 113 Ind. 434. This long continued, uniform and unchallenged interpretation of the Constitution, sanctioned by the people and acquiesced in by all departments of government, under well established rules of construction must now be regarded as conclusive, and as sufficient to dispel any possible doubt and set the question forever at rest, until the people shall see fit to disturb it by changing the organic law of the State. *Board, etc., v. Bunting*, 111 Ind. 143; *State, ex rel., v. Harrison*, 116 Ind. 300; *Pollock v. Bridgeport, etc., Co.*, 114 U. S. 411.

Whatever fluctuations may have occurred in legislation concerning other interests, it must be said that through all the varying tides of political opinion, the General Assembly, for nearly a half century, has adhered with singular steadfastness to such a construction of the Constitution as gave it the right now questioned. If there were no other ground upon which to rest our decision, this unchallenged legislative exposition would prevent the court from interfering.

That the General Assembly may, as was done once before, commit the power to the Governor, can not be doubted. Abiding as our conviction might be concerning the propriety of the Legislature imposing part of the responsibility upon, and sharing the supervision and control of these great institutions with, the chief executive of the State, it would neither be fitting, nor would it avail anything, to express that conviction here. The people have imposed the duty upon

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the legislative department, and to the people it must give account, and not to the courts.

The task set this court is performed when we have, in the light of the principles and authorities referred to, stated our conclusions as to the power of the respective departments under the Constitution and the law, which constitute the only chart for the guidance of the court, as it does for the other departments of government.

It only remains that we notice briefly the objection that the bill providing for the reorganization of the several boards is not authenticated as required by the Constitution. What purports to be "a full, true and complete copy of enrolled act No. 249, House of Representatives, passed by the General Assembly of the State of Indiana, over the Governor's veto, as the same appears of record in this office," is officially certified to us by the secretary of state, under the seal of the State. It appears by the endorsement of the secretary thereon to have been received and filed by him in his office on the 5th day of March, 1889. Looking upon the face of the act, its title and contents appear to be complete and perfect in form, and it bears upon its face the attestation of the speaker of the House of Representatives and of the president of the Senate, as the Constitution requires. It does not have upon it the signature of the Governor. We accept as explanatory of the absence of the attestation of the chief executive, the official statement made by the secretary of state, under the seal of the State, that the act "was passed by the General Assembly of the State of Indiana over the Governor's veto."

If this were not deemed a sufficient explanation, the court might, doubtless, avail itself, for mere purposes of information, of any public records which the law makes provision for in order to preserve a history of legislative events. But we do not deem this of any consequence. No evidence which might be resorted to could override the constitutional authentication which appears upon the face of the enrolled act. The function of the court, in that regard, is completely dis-

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charged when it receives and determines the validity of an enrolled act, properly certified from the proper depository, which bears upon its face the constitutional attestation of the presiding officers of the respective houses of the General Assembly. The validity, or proper authentication, of an act can not be brought in question by instituting an inquiry of fact into matters extraneous to the act itself. It must carry the evidence of its authentication on its face, beyond which courts will not look for the purpose of ascertaining whether the act was regularly passed or properly authenticated. *Board, etc., v. Burford*, 93 Ind. 383, and cases cited; *Evans v. Browne*, 30 Ind. 514.

An act may become a law in several ways without the signature or approval of the Governor, and when, as in this case, an enactment is certified by the legal custodian, properly authenticated and complete in form, judicial investigation is at an end, the conclusive presumption being that the act became a law in some constitutional method without the approval, or notwithstanding the disapproval, of the chief executive.

The judgment of the Marion Circuit Court is affirmed, with costs.

Filed April 20, 1889; petition for a rehearing overruled June 20, 1889.

#### SEPARATE OPINION.

BERKSHIRE, J.—I concur with the conclusion reached in the opinion of the court delivered by MITCHELL, J., that the relator was duly elected one of the trustees for the insane asylum, and should be commissioned as such. But with the reasoning and argument I disagree.

When the present Constitution was adopted the old Constitution was abrogated and all governmental power not granted by the new Constitution rested with the people. The Constitution divides the State government into three departments, the legislative, executive and judicial. I quote a part of section 1, article 3: "No person charged with offi-

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cial duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Whatever power the Legislature possesses it derives by grant in the Constitution, and like the other departments is limited to the exercise of the power granted.

The word "expressly," as used in the foregoing article of the Constitution, is defined by Webster as follows: "In an express, direct or pointed manner; in direct terms; plainly." The word "express" is defined: "Directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention; clear, plain." Legislative power is the power to enact laws and matters incidentally connected therewith. This, I believe, is the accepted definition.

The power to appoint to office is an executive power or function, and is lodged with the executive (which includes the administrative) department of the government, except where the organic law expressly provides otherwise. The Legislature may create offices, but has no power to appoint officers, except such as relate to the exercise of its legislative functions or power, unless the power so to do is conferred expressly by the Constitution, and then it must be exercised within the letter of the constitutional provision. Nothing can be taken by implication.

There is some appointing power given to the Legislature in our Constitution other than that which relates to the exercise of its legislative power. This grant of power will be found in section 1 of article 15, which reads: "All officers whose appointments are not otherwise provided for in this Constitution shall be chosen in such manner as now is, or hereafter may be, provided for by law." There were certain offices in existence when the present Constitution was adopted that were continued, and no provision is made in the Constitution for the election or appointment of the officers to fill those offices.



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At that time the General Assembly claimed and exercised the appointing power as to certain of those officers. The words "now is" in the constitutional provision above, continued the power in the legislative department to appoint those officers, but gave to it no power to appoint others. It gave to the General Assembly no power to create an office and name the incumbent. The officers which the Legislature is given the power to appoint are a class of State officers. No other construction can be given to section 18, article 5, of the Constitution, which reads: "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of judge of any court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

The antecedent to which the words "any other State office" relate, is an office "the appointment to which is vested in the General Assembly." Whatever of the offices now in existence, which were in existence when the Constitution was adopted, to which the Legislature appointed the incumbents, section 1, article 15, *supra*, continued the appointing power in the Legislature, and so with the other governmental departments, except so far as has otherwise been provided by law. The Legislature may provide by law for the appointment of all officers not provided for in the Constitution, but the appointing power must be lodged somewhere within the executive department of the government.

The only offices now in existence that existed when the Constitution was adopted, to which the General Assembly exercised the power of appointing the incumbents, are, so far as I have been able to ascertain, the State librarian, warden of the State's prison at Jeffersonville—State prison south—and the trustees of the insane asylum. There may be others; if so, I have overlooked them. R. S. 1843, p.

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101 ; Local Laws, 1845, p. 35 ; Acts of 1847, p. 99 ; Acts of 1848, p. 83.

The trustees of the blind asylum and of the deaf and dumb asylum were appointed by the Governor. Acts of 1845, p. 56 ; Acts of 1846, p. 19 ; Acts of 1847, p. 41.

Practical construction is of very little consequence where it is exercised in violation of the plain provisions of the Constitution.

There is one other question—the authentication of the law by virtue of which the relator claims to be a trustee of the insane asylum. My opinion is, that when a bill passes both houses of the General Assembly by the requisite constitutional majority, is properly signed by the presiding officers, is transmitted to the Governor, and he refuses to sign it, but returns the same with objections to the house where it originated, and the objections are entered at large on its journals, and the bill again passes that house by the requisite constitutional majority, and is transmitted to the other house, together with the Governor's objections, and passes that house by a constitutional majority, it then becomes a law. The Constitution so provides. My opinion is, that in case of a returned bill the journals are proper evidence of its final passage and validity as a law, if not conclusive evidence thereof.

Filed April 20, 1889.

#### SEPARATE OPINION.

COFFEY, J.—While concurring in the opinion in this case I am unable to agree with my brother MITCHELL in the process of reasoning by which the conclusion is reached. I do not believe that the duty conferred on the General Assembly by the Constitution, to provide for the benevolent institutions of the State, carries with it the power to appoint officers to manage such institutions. Certainly no such power is expressed, and if it exists it must be by implication.

An appointment by the Legislature to an office not con-

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nected with the discharge of its duties as a legislative body, involves the exercise of executive or administrative functions. By section 1, article 3, of the Constitution, it is prohibited from exercising such functions, unless the power to do so is *expressly* conferred upon it by the Constitution. It is not sufficient that language is used from which such power may be inferred; it must be *expressly* conferred.

In my opinion, section 1, article 15, when construed in connection with the law in force at the time of its adoption, does confer on the Legislature the power to appoint the appellee to the office he is now claiming. By the terms of that section the Legislature has the power to appoint such officers as it had the right to appoint under the law in force at the time of the adoption of the Constitution, unless a different mode of selection was provided for by the Constitution itself. It is upon this ground, and the practical construction heretofore given it, alone, that I am enabled to concur in the opinion in this case. I do not believe that the framers of the Constitution intended to confer on the General Assembly any general appointing power.

Filed April 20, 1889.

#### SEPARATE OPINION.

OLDS, J.—I concur in the conclusion reached by MITCHELL, J., as to the right of the General Assembly to appoint the particular officer in question in this case, but I do not concur in all of the reasoning by which such conclusion is reached.

Filed April 20, 1889.

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The Travellers Insurance Company v. Patten *et al.*

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No. 13,671.

## THE TRAVELLERS INSURANCE COMPANY v. PATTEN ET AL.

**MORTGAGE.—Foreclosure.—Subsequent Purchaser.—Taxes and Improvements.—Attorney.—Unauthorized Contract of Settlement.—Ratification.—Deed.**—Where it is adjudged in an action by A. to foreclose a mortgage that he shall pay to B., who is a subsequent purchaser, a certain sum of money for taxes paid and improvements made by the latter, and that B. shall thereupon execute a deed to A. for the real estate, and afterwards A.'s attorney, although having no authority to that end (of which want of authority B. is ignorant), enters into a contract with B. that the payment of the judgment and the delivery of the deed and possession of the real estate shall constitute a full settlement of the matters in controversy between the parties, and the money is thereupon paid, the deed executed and possession of the real estate delivered, A. can not, upon a subsequent reversal of the judgment on appeal, he having received and retained the benefits of the contract, and thereby ratified the same, recover from B. the money paid.

From the Sullivan Circuit Court.

*F. H. Levering* and *D. V. Burns*, for appellant.

*J. C. Briggs, J. T. Beasley, J. T. Hays, A. B. Williams* and *H. J. Hays*, for appellees.

OLDS, J.—This case has been in this court once before. *Travellers Ins. Co. v. Patten*, 98 Ind. 209. After the case was certified back to the Sullivan Circuit Court, the appellant filed an amended and a supplemental complaint for the recovery of the \$523.13 which the appellant had paid to the appellee James B. Patten. To the amended complaint appellees filed a disclaimer as to any interest in the land, and answered the supplemental complaint by a general denial. The parties, plaintiff and defendants, also entered into a written agreement, which was filed in the cause, to the effect that all evidence might be introduced and all defences made under the general denial which might be introduced and made under any special plea, the same as if specially pleaded, and

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requested the court to make a special finding of the facts and state its conclusions of law thereon. Thereupon the court found the facts and stated its conclusions of law as follows:

“Finding of facts: That on the 22d day of January, 1876, William S. Crawford executed the mortgage and notes mentioned in the complaint; that the mortgage was properly filed for record and recorded in the recorder's office of Sullivan county, Indiana, on the 25th day of January, 1876; that the amount due on said notes and mortgage is \$13,039, and a reasonable attorney fee for prosecuting the suit for foreclosure is \$350; that on the 7th day of March, 1879, the legal title of said Crawford in said mortgaged premises described in the complaint, except the 16 acres in S. W. qr. of S. E. qr. of section 2, was conveyed to the defendant James B. Patten, and said Patten, at the time he received the conveyance, had notice of the existence and record of said mortgage, and said Sarah F. Patten is the wife of said James B. Patten; that at the January term, 1882, of this court, on a trial of this cause, it was ordered, adjudged and decreed by the court that the plaintiff pay to said defendant James B. Patten the sum of \$100, with ten per cent. interest thereon from the 12th day of July, 1879, and the further sum of \$162.50 for valuable and lasting improvements made by said defendant on said real estate, and the further sum of \$226.90, the taxes, interest and charges paid out by said defendant, said sum to be paid within four months from the date thereof; and upon the full and complete payment of said several sums within the time aforesaid, then it was ordered, adjudged and decreed by the court that said James B. Patten and his wife, Sarah Patten, convey to said plaintiff by quitclaim deed the said real estate, and upon defendants' default to do so, then, and in that event, — be and he was appointed a commissioner of said court to make said conveyance; and unless the plaintiff, within the time limited, should pay to the defendant James B. Patten the several amounts therein decreed to be

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paid, then said plaintiff should be forever barred, and the defendant James B. Patten's title to said real estate should be forever quieted, and held good against the plaintiff and all persons claiming through or under it, and that defendants recover of plaintiff their costs therein laid out and expended, taxed at \$—; that, on the 11th day of May, 1882, the plaintiff, by Sewell Coulson, one of its attorneys, paid to the clerk of said Sullivan Circuit Court the sum of \$523.13 in payment of said judgment against plaintiff, and on the 15th day of May, 1882, said clerk paid said sum of money to the defendant James B. Patten, and on the same day said Patten and his wife, Sarah F. Patten, executed and delivered to the plaintiff a deed for the southeast quarter of section 16, in township 9 north, range 8 west, in said Sullivan county, containing 160 acres, and on the same day plaintiff took possession of said real estate under said deed, and has been in the continuous possession thereof ever since, and has received the rents, issues and profits thereof, amounting to \$200 per annum, and has paid taxes thereon, amounting to \$108.13, including taxes for the year 1882, and on the same day the record of this cause, in the original trial, was filed in the Supreme Court of the State on appeal; that at the time said money was paid to the defendant James B. Patten, and at the time said deed was delivered to the plaintiff, said Sewell Coulson was one of the attorneys of record for the plaintiff in the prosecution of this cause, employed by F. H. Levering, the general attorney for plaintiff in the State of Indiana, to assist in the trial of this cause, and it was agreed by and between said Coulson, as such attorney, and said defendant James B. Patten, that said payment of said judgment and the delivery of said deed and possession of said real estate should be a full settlement of the controversy between said plaintiff and defendants, but said Coulson had no authority to make any agreement in the case, except such authority as he had under his employment by said Levering, and said defendant Patten had no notice

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that said Coulson had no such authority; that at the May term, 1884, of the Supreme Court of the State of Indiana, said cause so appealed to said court was in all things reversed by said court, with instructions to grant a new trial therein, and said opinion and judgment of said Supreme Court was duly certified to and filed in said Sullivan Circuit Court and a new trial was granted in said cause; that before the filing of the supplemental complaint in said cause, the plaintiff demanded of said defendant James B. Patten the repayment of said sum of \$523.13, which said defendant refused to pay, and the same remains unpaid; that plaintiff has never tendered to defendants, or either of them, a deed for said real estate conveyed by them to plaintiff, nor offered to convey the same to them, nor offered to pay to defendants, or either of them, the rents, issues or profits of said real estate for the time they occupied the same under said deed; that on the 21st day of April, 1883, said defendants conveyed to George W. Buff the lands described in the complaint, except the lands conveyed by defendants to plaintiff, and except said sixteen acres in southwest quarter of southeast quarter of section 2, and on the same day said George W. Buff and wife conveyed the same to plaintiff, and that the deed from said defendants to said Buff had never been recorded; that plaintiff now holds the legal and equitable title to all of the real estate described in the complaint that was ever conveyed to defendants, or either of them, and said lands are of the value of \$8,500; that the lands conveyed by defendants to plaintiff are of the value of \$4,000."

Upon the foregoing facts the court stated as conclusions of law: "*First.* That the plaintiff is not entitled to a foreclosure of said mortgage against defendants. *Second.* That plaintiff is not entitled to recover on the complaint and supplemental complaint. *Third.* Defendants are entitled to recover their costs laid out and expended since the granting of the new trial herein."

Plaintiff excepted to the conclusions of law.

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It is contended by counsel for appellant that the \$523.13 was paid, and the deeds executed, by reason of and in compliance with the order and judgment of the court rendered in the first trial of the cause; that plaintiff was compelled to pay the money in compliance with the judgment of the court to avoid forfeiting its right to the land in case the judgment was not reversed. If the facts found presented the question as argued by the counsel for appellant, or if the appellant had paid the money with a view of preventing a forfeiture of its right to the land, and made no agreement, and had not taken possession of the land under the deed and received the rent, it would present an entirely different question from that presented by the finding of facts in this case. The facts as found show that at the time of the acceptance of the money by the defendant and the execution of the deed, it was agreed between the defendant and the attorney for the plaintiff in the cause, that the payment of the money and the execution and acceptance of the deed should be a settlement of all matters in controversy, which were the matters in litigation; that although the attorney had no authority to make such agreement, such want of authority was not known to defendant, and that plaintiff accepted the benefit of the contract, accepted the deed made in pursuance of such contract, took possession of the real estate and received and accepted the rents and profits of the land from May, 1882, to 1886, when the cause was reversed, to the amount of \$200 per year, and kept and retained the benefit of the contract made by the attorney, which was in excess of the amount paid, and now seeks to recover back the consideration paid for the deed and possession of the real estate.

The finding of facts shows the money to have been received by defendant, and deeds executed by him to the plaintiff, in pursuance of an agreement of settlement, and not in pursuance of the order of court, and the appellant accepted the contract and retained the benefits of it and thereby rati-



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fied the same. There is no error in the conclusions of law stated by the court.

Judgment affirmed, with costs.

Filed April 16, 1889; petition for a rehearing overruled June 19, 1889.

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No. 13,598.

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119	421
139	286
119	421
151	583

**TAXES.—Sale.—Foreclosure of Lien.—Jurisdiction of Marion Superior Court.—**

The Superior Court of Marion county has jurisdiction of actions brought by persons holding invalid tax deeds to recover from the owners of the land the amount due, and to foreclose his lien.

**SAME.—Judgment Liens.—When Divested.—**A sale under a decree of the Marion Superior Court foreclosing a tax lien divests the liens of judgment creditors who are parties to the proceeding.

**SAME.—Tenants in Common.—**The rule that one tenant in common can not acquire title to the land of a co-tenant by purchasing the same at a tax sale, can not apply where, prior to the sale, the co-tenant conveyed his interest to the purchaser.

**SHERIFF'S SALE.—Payment of Purchase-Money.—Presumption.—**Where the sheriff executes a deed to the purchaser, at a sale made by him, it will be presumed, in the absence of any showing to the contrary, that he collected from the purchaser the amount of the bid.

From the Marion Superior Court.

*F. J. Van Vorhis, W. W. Spencer, E. P. Ferris and J. S. Ferris*, for appellants.

*S. J. Peelle, W. L. Taylor, H. Speed and O. B. Jameson*, for appellees.

**COFFEY, J.**—This was an action for partition brought in the Marion Superior Court. The facts, so far as they affect the

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questions in controversy here, are, that Philip J. Meikel died in 1849, the owner in fee of lots seven and eight, in block thirty-three, in the city of Indianapolis, leaving a widow, Mary C. Meikle, and the following named children : George W. Meikel, who was killed in front of Petersburg, Virginia, September 10th, 1864 ; Charles P. Meikel, who died April 5th, 1884, leaving the plaintiffs, Harry O. Meikel and George W. Meikel ; John M. Meikel, who died, unmarried, on the 2d day of November, 1881, Fred. J. Meikel and Caroline M. Meikel.

In 1864, in a partition suit in the common pleas court of Marion county, said real estate was divided into five lots, marked, respectively, A, B, C, D and E. Lot E was set off to the widow during her natural life, and the other four lots were assigned and set off to the children.

On the 4th day of November, 1875, Charles P. Meikel and his wife executed a deed to Jesse Jones, to the undivided one-fourth of lot E, subject to the life estate of the widow, to whom it had been assigned in trust for Harry O. Meikel, George W. Meikel and Carrie L. Meikel, his children.

On the 20th day of May, 1877, the First National Bank, of Indianapolis, recovered a judgment, in the Marion Superior Court, against John M. Meikel for \$589.27.

On the 11th day of May, 1877, John Knight recovered judgment in the same court against said John M. Meikel for \$131.30.

On the 16th day of May, 1877, William J. Johnson and Samuel Johnson recovered judgment against Fred. J. Meikel for \$131.67, before a justice of the peace, a transcript of which was filed and recorded in the clerk's office of the circuit court of Marion county on the same day.

On the 12th day of May, 1877, Clement Vonnegut recovered judgment, in the Marion Circuit Court, against said John M. Meikel for \$162.36, upon which Fred. J. Meikel became replevin bail.

On the 18th day of June, 1877, David Munson obtained

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judgment against Fred. J. Meikel, before a justice of the peace, for \$127, a transcript of which was filed in the clerk's office of Marion county on the 11th day of March, 1878. These judgments are all unpaid.

On the 11th day of July, 1881, John M. Meikel and Fred. J. Meikel conveyed all their interest in said lot E to the appellee Caroline M. Meikel.

On the 16th day of July, 1881, Caroline M. Meikel executed to Kate E. Cole a mortgage on her interest in said lot E, to secure a note of \$800, which note and mortgage were assigned to the appellee Amanda Curtis. The widow of Philip J. Meikel died prior to the year 1880.

In December, 1880, Frank McWhinney, holding tax deeds to said lot E, brought suit in the superior court of Marion county, Indiana, to obtain possession of the same, and to quiet his title, to which all the judgment creditors above named were made parties defendants, and were duly served with process. All the other parties to this suit were likewise made parties to that action. On the trial of the cause the court found that said tax deeds were not sufficient to convey title, and proceeded to find the amount due the said McWhinney on account of the taxes paid by him, declared the same a lien on said lot, and entered a decree foreclosing the same and ordering a sale of said lot by the sheriff unless the sum so found due was paid within sixty days. The court further ordered that said sale should be made without relief from valuation laws; that there should be no redemption therefrom, and that the sheriff should, at once, execute a deed to the purchaser. None of the parties having paid the sum found due to McWhinney within the sixty days fixed by the court, the sheriff of Marion county proceeded to sell the said lot, and Caroline M. Meikel bid in three-fourths thereof, and the sheriff executed to her a deed therefor.

Upon these facts the court, at special term, found that said judgment creditors had no liens upon said lot, and rendered judgment against them for costs, they having filed cross-com-

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plaints in this action, setting up their respective judgments as liens. Upon appeal to the general term said finding and judgment were affirmed, and the said judgment creditors now appeal to this court, and assign as error that the Marion Superior Court, at general term, erred in affirming the finding and judgment of the court at special term.

There is no controversy between the owners of this lot as to their respective interests in the same. It is conceded that Harry O. Meikel and George W. Meikel are entitled to one-fourth thereof, and that Caroline M. Meikel is entitled to the remaining three-fourths. The controversy is between the appellants as the judgment creditors of John M. Meikel and Fred. J. Meikel, and the appellee Caroline M. Meikel.

The first contention of the appellants is, that the superior court of Marion county had no jurisdiction of the subject-matter of the action brought by McWhinney. If this be true, it must be conceded that the decree rendered in McWhinney's favor by that court was void, and that Caroline M. Meikel, by her purchase thereunder, acquired no title to the property in controversy. It would also follow that such decree and sale did not divest the liens of the judgment creditors, and that their liens still exist.

By section 1351, R. S. 1881, the superior court of Marion county has jurisdiction, concurrent with the circuit court, of all civil actions except slander, and except causes of which the common pleas court had, at the time of the passage of the act, original exclusive jurisdiction. By section 1353 it is declared to be a court of general jurisdiction. This act went into force February 15th, 1871, and was consequently in force when McWhinney brought his action.

By the act 1872 (1 R. S. 1876, p. 129, section 257), it is provided that any person holding a deed on land from the county auditor for the non-payment of taxes, may commence a suit in the circuit court of the county where such land lies, to quiet title thereto, etc. If it appear that the

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title is invalid for any cause not enumerated in section 252, such suit shall not be dismissed, but the court shall ascertain the amount of taxes, with penalty and interest due, etc.

The question is, did the Legislature, by this act, intend to confer on the circuit court exclusive jurisdiction in suits to quiet title on deeds held under a tax sale? At the time the act creating the superior court of Marion county took effect the following statute was in force: "If any conveyance for taxes shall prove to be invalid, and ineffectual to convey title \* \* the lien which the State has on such lands shall be transferred to and vested in the grantee, his heirs or assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest and penalty, legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof." 1 G. & H., p. 111, section 173.

It can not be doubted that the act creating the superior court authorized the holder of a conveyance under a tax sale, which had proved to be invalid, to bring suit under the above statutory provision in that court to recover the amount of taxes, interest and penalty due, and to foreclose his lien.

The only difference between this act and the act of 1872 is, that the act of 1872 authorizes the holder of such conveyance to settle both the question of his title and the right to recover the taxes, penalty and interest in the same suit. As the law abhors a multiplicity of suits, doubtless to prevent this was the only object the Legislature had in view. There is nothing in the statute of 1872 which leads to the conclusion that there was any intention to take away from the superior court the jurisdiction it then had in such cases and transfer it exclusively to the circuit court. In our opinion, the Marion Superior Court had jurisdiction over the subject-matter of the suit brought therein by McWhinney. Having, as we have seen, also jurisdiction of the persons of the

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parties to this suit, it follows that they are bound by all the orders, judgments and decrees made in that cause.

It is also contended that the appellee Caroline M. Meikel did not acquire title to this property by her purchase under the McWhinney decree, for the reason that she was a tenant in common with John M. Meikel and Fred. J. Meikel. It must be conceded that, ordinarily, one tenant in common can not acquire title to the lands of his co-tenants by purchasing the same at a tax sale. *Elston v. Piggott*, 94 Ind. 14.

But in this case it must not be forgotten that five days before her purchase John M. and Fred. J. Meikel conveyed to her by deed all their interest in said lot. They were not, therefore, at the time of her purchase tenants in common.

It is further contended that the special finding does not show that Caroline M. Meikel, at the time of her purchase under the McWhinney decree, paid the purchase-price. The special finding shows that the sheriff executed to her a deed. It was the duty of the sheriff, before executing a deed to the purchaser, to collect the purchase-price. The law presumes that every officer does his duty. As the sheriff executed to her a deed for said property, in the absence of any showing to the contrary, it must be presumed that he collected from her the amount of her bid.

It is sought to have this court settle the rights of the appellants Harry O. Meikel and George W. Meikel against their trustee, Jesse Jones, but an examination of the record discloses the fact that the superior court expressly reserved for future consideration the rights of these parties as between themselves. There is, therefore, no question here as to their rights as against the trustee to be considered by us.

We find no error in the record for which the finding and decree of the superior court should be reversed.

Judgment affirmed.

Filed March 30, 1889; petition for a rehearing overruled June 19, 1889.

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The Studebaker Brothers Manufacturing Company v. Bird.

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No. 13,072.

**THE STUDEBAKER BROTHERS MANUFACTURING COMPANY  
v. BIRD.**

**PRACTICE.**—*Parties.*—*Admission on Application.*—*Rights of.*—*Query,* whether one who is made a party to an action on his own application, and who is not a necessary party to a complete determination of the same, can have any standing in court except by a cross-action asking affirmative relief.

**CHATTEL MORTGAGE.**—*Fraud.*—*Preference of Creditor.*—*Weight of Evidence.*—Fraudulent intent is a question of fact, and where the finding of the trial court in favor of the validity of a chattel mortgage, executed by an insolvent debtor to secure one creditor to the exclusion of others, is sustained by some evidence, the Supreme Court will not interfere.

From the Decatur Circuit Court.

*J. K. Ewing and C. Ewing, Jr.,* for appellant.

*J. D. Miller and F. E. Gavin,* for appellee.

**BERKSHIRE, J.**—The appellee brought this action against Leonidas Bird and John W. Shields, partners, doing business under the firm name of Bird & Shields, and John G. Guthrie, assignee of Bird & Shields, to foreclose a chattel mortgage executed by Bird & Shields to secure the appellee against loss as their surety on several outstanding obligations.

The appellant and the Minneapolis Harvester Works were made parties defendants to the action on their own application, and filed a joint answer in two paragraphs, the first of which was a general denial, and the second alleged facts tending to show that the mortgage was executed in fraud of creditors.

The appellee filed a demurrer to the second paragraph of answer, but before it was ruled upon by the court the appellee withdrew it, and filed a general denial in reply.

The issues were submitted to the court for trial, and a finding made in favor of the appellee. The appellant filed a

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motion for a new trial, which the court overruled, and the appellant excepted, and the court rendered judgment for the appellee, and a decree foreclosing the said mortgage. The Studebaker Brothers Mfg. Company is the only appellant.

A question we suggest, but do not decide, is, whether the appellant had, or could have, any standing in court after having been made a party on his own application, except by a cross-action entitling him to affirmative relief? The appellee was asking no relief against the appellant, and, so far as the appellee's action was concerned, the appellant was not a necessary party to a complete determination of the same.

It is a question of practice, worthy of consideration, whether in any case, where a person is made a party to an action upon his own application, and when the complaint alleges no cause of action against him, he can have any standing in court without a pleading whereby he seeks affirmative relief. The plaintiff may not have, nor claim to have, any cause of action against the new party, and certainly if he is not before the court his rights will not be prejudiced.

We come now to the only question discussed by appellant's counsel, which is, that the finding is not sustained by the evidence.

It is a rule of this court, so long and well settled as not to require a citation of authorities, that this court will not interfere with the finding of the *nisi prius* court upon a question of fact where there is some evidence to sustain the finding of the court, even though this court may be of the opinion that the finding is contrary to the weight of the evidence. But, under our statute of frauds and perjuries, the question of fraudulent intent is peculiarly a question of fact for the court or jury trying the question, and therefore the rule to which we have referred applies with more vigor, if possible, in cases where the *bona fides* of a transaction are brought in question than in other cases.

The evidence in this case covers above two hundred and



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seventy-five pages of legal-cap, and we have examined it critically and carefully, and after having done this we must say that we find nothing unusual in the facts and circumstances indicating bad faith, but just what usually occurs when one creditor, as he has a right to do, secures his debt to the exclusion of others. There is this much to indicate the good faith of the transaction that is somewhat out of the usual order where bad faith is claimed.

There is nothing in the evidence to show that the indebtedness which the mortgage was given to secure was not *bona fide*, nor is it seriously claimed that the collaterals held by the appellee were more than sufficient to make him whole. The right of one creditor to secure himself to the exclusion of other creditors has been carried much farther than is necessary for the purposes of this case. This court has recognized the right of a creditor of one of the members of a firm to secure his debt out of the partnership assets to the exclusion of partnership creditors. *Purple v. Farrington*, ante, p. 164; *Fisher v. Syfers*, 109 Ind. 514; *Winslow v. Wallace*, 116 Ind. 317. See *Goudy v. Werbe*, 117 Ind. 154.

Judgment affirmed, with costs.

Filed June 20, 1889.

No. 13,613.

SCHNURR v. STULTS ET AL.

**NEW TRIAL.—Affidavits.—Practice.**—The finding of the trial court upon an issue of fact presented by affidavits and counter-affidavits filed in support of a motion for a new trial, is binding upon the Supreme Court.  
**SAME.—Newly Discovered Evidence.—Diligence.**—It is not enough that one who asks a new trial on the ground of newly discovered evidence shall

119	429
123	409
119	429
128	406
119	429
134	404
119	429
144	385
144	391
145	7
145	672
146	679
147	379
119	429
158	878
119	429
171	101

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aver in general terms that he exercised diligence; the particular acts of diligence must be shown.

**SAME.—Cumulative Evidence.—Change of Result.**—A new trial will not be granted where the newly discovered evidence is cumulative, or where it is not shown that the new evidence would probably change the result.

**INTERROGATORIES TO JURY.—Items of Evidence.—Practice.**—Interrogatories which call merely for items of evidence should not be submitted to the jury.

From the Huntington Circuit Court.

*B. M. Cobb* and *C. W. Watkins*, for appellant.

*J. B. Kenner* and *J. I. Dille*, for appellees.

**ELLIOTT, C. J.**—The appellant claimed in the court below a new trial upon the ground of newly discovered evidence. An issue of fact was made by counter-affidavits, and upon this issue the appellant failed. So far as the affidavits and counter-affidavits properly presented an issue of fact, the decision of the trial court is binding upon us, as it is well supported.

If, however, the affidavits of the appellant only are to be considered, they do not entitle him to a new trial, for there is not such diligence shown as the law requires. One who asks a new trial upon the ground of newly discovered evidence must show particular acts of diligence. It is not enough for him to aver, in general terms, that he exercised diligence. *Hines v. Driver*, 100 Ind. 315; *Allen v. Bond*, 112 Ind. 523. This rule disposes of the statements of the affidavits as to the written contract which they describe, for it does not appear that there was a diligent and proper search or inquiry made before the trial, and it also disposes of the oral admissions of which the affidavits make mention. The law requires diligence before trial, and views with disfavor motions for new trials on the ground of newly discovered evidence.

The evidence alleged to be newly discovered is cumulative, for the appellant himself testified to the same matters as those stated in the affidavits. *Atkisson v. Martin*, 39 Ind. 242;

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*Fox v. Reynolds*, 24 Ind. 46; *Lefever v. Johnson*, 79 Ind. 554.

The affidavits fail to show that the newly discovered evidence would probably change the result. The newly discovered witness, in other affidavits, so fully contradicts the statements contained in the affidavit made by him at the instance of the appellant, that his testimony could not have much, if any, weight in appellant's favor.

There was no error in refusing to compel the jury to itemize the articles of property contained in the saloon which was sold by the one party to the other. It is a mistake to suppose that evidence is to be stated in answers to interrogatories. *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544. The practice of asking for items of evidence has been justly and severely censured. *Ward v. Busack*, 46 Wis. 407.

The verdict is well supported by the evidence.

Judgment affirmed.

Filed June 22, 1889.

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No. 13,436.

WHITE v. BURKETT ET AL.

**MANDAMUS.**—*Jurisdiction.*—*Inferior Court.*—*Correction of Record.*—A writ of mandate may not be issued by the circuit court to compel a county auditor to correct an erroneous description of land appearing in the records of the board of county commissioners in a drainage proceeding had before such board.

**SAME.**—*Proper Remedy.*—*Appeal.*—In such case the proper remedy is by an application to the board of commissioners, and the circuit court can only acquire jurisdiction by appeal from the judgment of the board.

From the Cass Circuit Court.

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White v. Burkett et al.

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*D. B. McConnell* and *S. T. McConnell*, for appellant.

*J. C. Nelson* and *Q. A. Myers*, for appellees.

MITCHELL, J.—White complained, in the Cass Circuit Court, of Burkett and others, and alleged that in the course of a proceeding instituted and carried on before the board of commissioners of Cass county, for the location and establishment of a ditch, the viewers had erroneously, and by oversight and mistake, described a certain tract of land as the “northwest quarter,” instead of the “southwest quarter,” of section, etc., and that the error thus made by the viewers had been carried through all the subsequent proceedings.

The plaintiff alleges that he constructed the work that was apportioned to the owner of the land, under a contract duly let by the county auditor, and he asks the court, by its mandate, to require the county auditor to correct the record of the board of commissioners in the respects mentioned, and, when so corrected, to place the amount due him on his contract on the proper tax duplicate against the land.

The power of courts to correct their records, so as to make them speak the truth, is well established, and rests upon sound reasons of public policy. But it is equally well settled that a mandate will be refused where it is asked for the purpose of compelling the court to which it issues to alter its record so as to correspond with the state of facts which it is proposed to establish in some other tribunal. High Ex. Leg. Rem., section 154. It is the peculiar province of every court to control its own records, or at least to have the first opportunity to do so. A superior court can not undertake to control the records or action of an inferior court by mandamus. *People v. Superior Court*, 20 Wend. 663; *Ex Parte Ostrander*, 1 Denio, 679; *Ex Parte Koon*, 1 Denio, 644.

A mandamus may issue to an inferior court, directing it to proceed according to law; but it can not be compelled to do a particular thing.

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As was said in *Wells v. Rhodes*, 114 Ind. 467: "If the commissioners' record did not speak the truth, the only method by which it could have been corrected was by an application to the board of commissioners for that purpose." *Jenkins v. Stetler*, 118 Ind. 275.

The auditor had no power to correct the report made by the viewers, nor was it his province to interfere with the record of the board of commissioners after it had been duly signed, except, possibly, to correct any misprision, or mere clerical error, committed by himself; and what he had no power to do voluntarily, the circuit court could not compel him to do by its mandate. We have no doubt of the power of the board of commissioners to correct its record, so as to make it conform to what actually took place. The landowner, who has received the benefit of the plaintiff's work, is in no position to object, after the work which he neglected to do has been completed by another. *Prezinger v. Harness*, 114 Ind. 491.

If notice was given, and work apportioned to the land actually intended to be described has been done, a liberal policy of amending the record to correspond with the facts should be applied, to the end that justice may be accomplished. A proper application or proceeding to that end must be instituted before the board of commissioners, and can only come under the jurisdiction of the circuit court by appeal.

There was no error.

The judgment is affirmed, with costs.

Filed June 20, 1889.

VOL. 119.—28

## LOTZ v. SCOTT ET AL.

*COSTS.—Judgment for.—Right to Enter after Final Disposition of Cause.—Change of Venue.—Failure to Perfect.*—Where, upon the failure of a party to perfect a change of venue applied for by him, the court sustains a motion to tax the costs against him, as provided in section 413, R. S. 1881, and the sustaining of the motion is entered of record, but no judgment for such costs is rendered, the court has jurisdiction, upon a proper application made by the adverse party after the dismissal of the cause, to then enter the judgment.

From the Sullivan Circuit Court.

*J. C. Chaney* and *W. S. Maple*, for appellant.

*J. C. Briggs*, for appellees.

OLDS, J.—Appellees brought an action against the appellant for an injunction in the Sullivan Circuit Court, and at the December term, 1883, the appellant moved the court for a change of venue from the county, which motion was supported by affidavit. The change was granted, and fifteen days given to pay the costs of the change. The appellant failed to pay the costs and perfect the change, and at the March term, 1884, the appellees moved the court to tax the costs up to the expiration of the fifteen days against the appellant, for the reason that appellant had failed to pay the costs and perfect the change. The court sustained the motion, and made an entry sustaining the motion, and the clerk entered the same in the order-book, but no judgment was rendered against the defendant below, the appellant, for such costs. The trial of the cause proceeded, resulting in a judgment in favor of the appellees against the appellant for twenty dollars and all costs. Appellant appealed from that judgment, and it was reversed, and afterwards the appellees dismissed their case. Afterwards the appellees filed their

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application in the nature of a complaint, setting up the facts, and asking that as to said costs included in their original motion, which had been sustained by the court, they have judgment against the appellant for the same. Notice of the application was duly served on the appellant, and he appeared and contested the same, and the court rendered judgment in favor of the appellees against the appellant for such costs, from which judgment appellant prosecutes this appeal. The question is presented as to the legality of the proceedings of the circuit court in rendering judgment for the costs.

It is contended by appellant that after a case has once been disposed of and determined in the circuit court, a motion can not be made in relation to the costs therein.

Section 413, R. S. 1881, provides that "If the party fail to pay the costs of the change within the time prescribed by the court, he shall be taxed with all the costs made in the case up to the time of such failure." The appellant was clearly liable for the costs adjudicated against him. The court passed upon the question during the pendency of the action, holding him liable, but there was an omission to enter judgment. As the cause stood before the reversal of the judgment by the Supreme Court, it was not material, as the final judgment included all costs. Before the dismissal of the cause the court clearly had the right to have entered judgment against the appellant for such costs. This application was made and notice served upon the appellant, and the parties were again brought before the court, the appellant appearing to the application to have judgment entered for the costs. The parties being thus brought back into court to complete the record, so as to enforce the rights and liabilities of the parties as they had been fixed in the case, the court had jurisdiction and authority to make the entry which it did in the case. The court has authority to make proper entries and adjudications as to the costs in a case when the parties are before the court, as in this case, after the dismis-

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sal of the cause. *Pittsburgh, etc., R. W. Co. v. Town of Elwood*, 79 Ind. 306. There is no error in the record.

Judgment affirmed, with costs.

Filed June 20, 1889.



No. 14,529.

SMITH ET AL. v. GORHAM ET AL.

**DECEDENTS' ESTATES.**—*Claim.*—*Allowance.*—*Employment of Counsel to Resist.*—*Conclusive Adjudication.*—*Sale of Real Estate.*—Where persons claiming an interest in real estate, as the grantees of a decedent's heirs, employ counsel to assist the administrator in resisting the allowance of a claim filed against the estate, an adjudication that the claim is valid is conclusive upon them, and they can not afterwards bring it in question in a proceeding by the administrator to sell the land to pay debts.

**SAME.**—*Evidence.*—*Record of Allowance.*—The record of the allowance of a claim against the estate of a decedent is *prima facie* evidence of the validity and amount of the claim.

**EVIDENCE.**—*Offer to Introduce.*—*Practice.*—To present any question upon the exclusion of evidence, the offer to introduce it must be specific; if the evidence is parol, the witness should be put upon the stand and questioned, and the testimony expected stated; if the evidence is documentary, it should be identified and then offered.

From the Hendricks Circuit Court.

*B. F. Davis* and *W. H. Martz*, for appellants.

*L. M. Campbell*, for appellees.

**BERKSHIRE, J.**—The administrator, Thornton G. Gorham, filed his petition to sell real estate for the payment of debts, to which the heirs of the decedent were made parties, and proper notice given. The appellants, who were not of the heirs of the decedent, claiming to have an interest in

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the real estate which the administrator was seeking to have sold, were, on their own application, made parties defendants to the petition, and appeared and filed an answer, in two paragraphs, to which demurrers were filed by the administrator and overruled by the court.

Among other things which are averred in the answer, we find the following: (1). That the indebtedness alleged in the petition, for the payment of which the administrator was asking that the real estate be sold, had no existence in fact; (2) that there was due the estate, from one James E. Smith, \$1,000, which, if collected, was amply sufficient to pay all of its indebtedness; (3) that by mistake the real estate described in the administrator's petition was conveyed to Archie Smith and the decedent jointly, they at the time being husband and wife, and did not, therefore, belong to the decedent, as the survivor, at her death, but upon the death of Archie Smith descended to his heirs, subject to a life estate in the decedent, Nancy, she being a second wife, without issue; (4) that appellants were the owners of the said real estate in fee simple when the administrator filed his petition.

The administrator filed a reply, in three paragraphs, the first of which is a general denial.

The principal indebtedness for the payment of which the administrator was asking an order to sell the said real estate was in the form of an adjudicated allowance, made in the Hendricks Circuit Court upon the trial of a denied claim which had been filed against said estate.

The second paragraph of the reply is to that part of the answer which denied the existence of the indebtedness, and it alleges, in substance, the filing of the claim, the refusal of the administrator to allow it, issue joined thereon, a trial and judgment allowing the claim; that the administrator made the best defence he could thereto, and that the appellants appeared at the trial, and, with the consent of the administrator, through their attorney, joined in resisting the allowance of the claim.

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The third paragraph of reply relates to that part of the answer alleging that the appellants are the owners in fee simple of the said real estate, and avers that they have an interest therein, but that they acquired that interest from the heirs of the decedent, and that the same is subject to sale in their hands.

Demurrers were filed and overruled to these paragraphs of reply, and the appellants excepted. The issues joined having been submitted to the court, it found in favor of the administrator, and, over a motion for a new trial, made an order for the sale<sup>e</sup> of the real estate. The appellants reserved an exception to the overruling of their motion for a new trial. The appellants assign several errors, only three of which are considered in their brief, and they are all that we need notice. These are : Error of the court in overruling the demurrer to the second paragraph of the reply, error of the court in overruling the demurrer to the third paragraph of the reply, and error of the court in overruling the motion for a new trial.

The paragraphs of reply are clearly good, and the appellants' counsel do not earnestly contend to the contrary.

As to the second paragraph, we may say that, if the appellants were present at the trial of the claim, and had counsel there assisting in resisting it, then they had their day in court, and the adjudication is conclusive upon them. Upon a proposition so well settled we do not feel called upon to cite authorities.

The motion for a new trial contains three reasons : 1. The court erred in admitting in evidence the record of the allowance of the claim. 2. The court erred in refusing to allow the appellants to prove, notwithstanding the adjudication and allowance by the court, that the estate owed the claimant nothing. 3. The finding of the court is not sustained by sufficient evidence.

The last reason is not discussed by counsel, and is therefore waived.

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The uncontradicted evidence introduced by the administrator is, that the appellants appeared at the trial and resisted the allowance of the claim; if, therefore, the admission of the record of the allowance, or the rejection of the offered evidence to prove that there was nothing due to the claimant, notwithstanding the allowance made by the court, would have been error under other circumstances, there was no error under the facts proven, for the appearance of the appellants rendered the adjudication conclusive as against them. But had the appellants made no appearance the record would have been competent evidence; it was *prima facie* evidence of the validity and amount of the claim. Acts 1883, section 8, p. 155; Acts 1883, section 12, p. 156; *Scherer v. Ingerman*, 110 Ind. 428; *Jackson v. Weaver*, 98 Ind. 307; *Cole v. Lafontaine*, 84 Ind. 446; *Riser v. Snoddy*, 7 Ind. 442; *Jennings v. Kee*, 5 Ind. 257.

The offer to prove that there was nothing due to the claimant, notwithstanding the allowance of the claim, was too indefinite and general to present any question as to the exclusion of evidence to this court. If the evidence which the appellants desired to introduce rested in parol, then the witness from whom the proof was to come should have been placed upon the stand, and a question propounded, and if objected to, and the objection sustained, then an offer should have been made as to what the witness would state in answer to the question. This would have properly presented the question in the record.

If the evidence was of a documentary character, it should have been identified and then offered. *Over v. Schiffing*, 102 Ind. 191; *Beard v. Lofton*, 102 Ind. 408; *Higham v. Vanosdol*, 101 Ind. 160; *Ralston v. Moore*, 105 Ind. 243; *Harter v. Eltzroth*, 111 Ind. 159. We find no error in the record.

Judgment affirmed, with costs.

Filed June 22, 1889.

No. 13,612.

## JONES ET AL. v. DUFFY ET AL.

APPEAL.—*Highway Proceedings.—Adverse Report of Reviewers.*—An appeal will not lie from the board of commissioners where the reviewers report against the public utility of a proposed highway, the remedy of the petitioners being to file a bond for costs and petition over.

From the Hamilton Circuit Court.

*A. F. Shirts, G. Shirts and J. A. Roberts*, for appellants.  
*R. R. Stephenson and W. R. Fertig*, for appellees.

ELLIOTT, C. J.—The appellees petitioned for an order establishing and opening a highway. The viewers reported that the proposed highway would be of public utility. The appellants remonstrated. Reviewers were appointed, and they reported that the proposed highway would not be of public utility, and the board of commissioners entered an order approving the report. The remonstrants moved to dismiss the appeal taken by the petitioners to the circuit court. The circuit court had no jurisdiction, and its judgment is without force as against a direct attack. The report of the reviewers conveyed to the commissioners the information that the proposed highway was not of public utility, and this finally determined the question, as the commissioners were bound to act upon the report. *Doctor v. Hartman*, 74 Ind. 221.

The question here is essentially the same as it was in *McKee v. Gould*, 108 Ind. 107, where it was held that an appeal will not lie from the report of the viewers. We are unable to discover any difference between that case and the present, for we think that it makes no difference whether the report comes from the viewers or the reviewers. The principle is the same. As was said in *McKee v. Gould, supra*, "The only remedy petitioners may resort to when an ad-

119	440
123	45

119	440
132	2

119	440
148	143

119	440
159	531

119	440
d171	157

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Gouchenour v. The Sullivan Building and Loan Association.

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verse report is made upon the subject of the utility of a highway petitioned for, is to file their bond for costs and petition over again." There is no conflict between the cases of *McKee v. Gould* and *Doctor v. Hartman*, for the latter case does not assume to decide what cases may be appealed, but simply decides that the board of commissioners can not vacate its final judgments.

Judgment reversed.

Filed May 16, 1889; petition for a rehearing overruled June 21, 1889.

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• No. 13,797.

**GOUCHENOUR v. THE SULLIVAN BUILDING AND LOAN ASSOCIATION.**

**BUILDING ASSOCIATION.—Fines.—Construction of By-Laws.**—The by-laws of a building and loan association provided that upon the failure of a member to pay certain monthly dues, he should be fined for the first week five cents, for the second five cents, for the third ten cents, and for the fourth and each succeeding week fifteen cents, for each share of stock owned by him. It was also provided that a fine of ten cents should be assessed each month on each share of stock for a failure to pay the monthly instalments of interest.

*Held*, that, no matter how long a delinquency continues, the highest fine assessable is fifteen cents per week for failing to pay dues, and ten cents per month for failing to pay interest.

From the Sullivan Circuit Court.

*J. T. Hays, H. J. Hays and J. S. Bays*, for appellant.

*J. C. Briggs, I. H. Kalley and A. A. Holmes*, for appellee.

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Gouchenour v. The Sullivan Building and Loan Association.

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OLDS, J.—The appellant filed his complaint in this action to enjoin appellee from foreclosing a certain mortgage given by appellant as a member of the Sullivan Building and Loan Association to secure a loan, to quiet title to certain stock in said association owned by appellant, and to prevent the collection of certain charges.

Appellee filed a demurrer to the complaint, which was sustained, and a judgment rendered for appellee on demurrer. Appellant reserved an exception, and assigns such ruling as error.

The question presented is as to the construction of the by-laws of the appellee, and the right of the appellee to charge and collect the fines and penalties charged and claimed by it. Section 1 of article 8 of the appellee's by-laws reads: "Each stockholder, for each and every share of stock owned or controlled by him or her, shall pay into the treasury, in lawful money, on or before the 7th day of March, 1883, and on or before the 7th day of each month thereafter, the sum of one dollar and ten cents for each share of stock so owned."

Section 2 of said article 8 reads: "Should any member fail to pay these monthly instalments punctually when the same shall become due, he shall be fined, for the first week five cents, for the second week five cents, for the third week ten cents, for the fourth and each succeeding week fifteen cents, for each share of stock he owns. Should any instalment, fine, or dues of any kind whatever, except those for which provision is hereinafter made, remain unpaid for a period of three months, all the shares of stock upon which such delinquency exists shall be forfeited to the association."

Section 3 of article 8 provides for a fine of ten cents for each month on each share for failure to pay the monthly instalments of interest.

It is contended by counsel for appellee that, upon failure to pay the dues for one month, the fines commence run-

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Gouchenour v. The Sullivan Building and Loan Association.

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ning against each share of stock at the rate of five cents each for the first and second weeks, ten cents for the third week, and fifteen cents for each week thereafter; and that, on the failure to pay the dues for the second month, duplicate fines run against the stock, and so on, increasing with every month's delinquency, and that the fines accumulate in like manner for failure to pay the monthly instalments of interest on a loan procured of the association. On the other hand, it is contended by counsel for appellant that the highest fine that can be assessed against any one share of stock for failure to pay dues is fifteen cents per week, and it matters not whether there be one month's dues or more unpaid, there can be but fifteen cents per week assessed against a share of stock; and that there can only be ten cents assessed against each share of stock each month for failure to pay monthly instalments of interest. We think the appellant's construction of the by-laws the proper one. By section 2, article 8, the fine is assessed for each share of stock upon which the dues remain unpaid, and it provides that if the "member fail to pay these monthly instalments" he shall be fined. We think it clear that the language used only contemplates one fine for each week for each share of stock, whether there be one or more instalments of dues unpaid, and the same construction must be placed upon the section providing for a fine for the non-payment of interest. It would be unreasonable to adopt any other theory of construction. It may be very questionable whether or not there can be more than one fine assessed for the delinquency in the payment of one instalment of dues on a share of stock; but that question is not presented in this case, as the fines properly assessable under the by-laws of the appellee, even allowing four separate fines to be assessed, for the first delinquency had been paid. *Hagerman v. Ohio Building, etc., Ass'n*, 25 Ohio St. 186; *Lynn v. Freemansburg Building, etc., Ass'n*, 117 Pa. St. 1.

From the conclusion we have reached as to the amount of

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The State, *ex rel.* Shryer *et al.*, *v.* The Board of Comm'rs of Greene County.

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finer assessable under the by-laws of the appellee, it follows that the court erred in sustaining the demurrer to the complaint.

Judgment reversed, at costs of appellee, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed June 21, 1889.

119	444
195	253
119	444
141	191

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No. 14,866.

THE STATE, EX REL. SHRYER ET AL., *v.* THE BOARD OF COMMISSIONERS OF GREENE COUNTY.

COUNTY COMMISSIONERS.—*Building or Repairing Bridge.—Discretion.—Mandate.*—When the question of building or repairing a bridge involves merely the matter of public convenience, the subject, under section 2885, R. S. 1881, is entirely within the discretion of the county commissioners, and when, in the exercise of that discretion, they have refused to build or repair the bridge, they can not be compelled to do so by mandate.

SAME.—*Destruction of Bridge.—Abandonment.—Repair.—Public Convenience.*—Where a bridge is practically destroyed, and the alternative is presented of repairing it or of abandoning it and resorting to some other means or place in order to cross the stream, the question is then one of public convenience, and is left by the statute to the discretion of the county commissioners; and if they determine that it is impracticable, on account of the condition of the county revenues, to repair and maintain the bridge, they can not be coerced by mandate.

From the Greene Circuit Court.

W. W. Moffett and C. E. Davis, for appellants.

S. O. Pickens, A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellee.



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*The State, ex rel. Shryer et al., v. The Board of Comm'rs of Greene County.*

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MITCHELL, J.—This is an appeal from a judgment against the relators, Shryer and others, who made application to the court below for a peremptory writ of mandate to compel the board of commissioners of Greene county to repair a bridge on a public highway over White river.

It appears, from the facts returned in a special verdict, that the bridge in question was built by the county about the year 1874, and that the highway of which it formed a part was a much travelled public thoroughfare until in the month of February, 1883, when the freshets washed away the bank and approach at the east end of the bridge, leaving that end of the structure out in the river. After that the bridge was practically abandoned, the commissioners, after considering a number of bids therefor, refusing to rebuild it. It was found that while it was in use the annual cost of keeping it in repair was \$380, and that it would cost \$15,000 to repair the bridge and approaches so that it could be used. The jury found that the permanent indebtedness of Greene county was \$90,000, and that there was a deficiency of over \$4,000 in the amount of funds on hand necessary to pay the outstanding orders for current expenses then incurred. The population of the county is 25,000, and the total value of the taxable property is \$5,627,950. They also find that it would be impracticable, considering the condition of the county revenues, to repair and maintain the bridge.

The question is, whether, upon the facts found, the court erred in refusing the writ prayed for. Section 2885, R. S. 1881, requires the county commissioners, whenever, in their opinion, the public convenience demands that a bridge should be repaired, or built, over any watercourse, to cause surveys and estimates therefor to be made, and direct the same to be erected. Section 2892 requires the boards of commissioners in each county to cause all bridges therein to be kept in repair. Evidently the duties of the commissioners, under the above sections, are not of the same character.

When the question of building or repairing a bridge in-

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The State, *ex rel.* Shryer *et al.*, v. The Board of Comm'rs of Greene County.

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volves merely the matter of public convenience, the subject is then entirely within the discretion of the board of commissioners, and it is not for the courts to interfere in any manner to control the judgment of that body. Where, as in this case, a bridge is practically destroyed, and the alternative is presented of repairing it, or of abandoning the bridge and resorting to some other means or place in order to cross the stream, the question is then one of public convenience, which, by the express terms of the statute, is committed to the "opinion," or discretion, of the county commissioners. A bridge may have been built at a place where events have demonstrated that it can not be maintained within any reasonable expenditure, or experience may have shown that public convenience would be better subserved by rebuilding the bridge at another place. These are subjects for the judgment of the board of commissioners.

It has been said, again and again, that circumstances may arise which may justify the board of commissioners, in the exercise of its discretion, in discontinuing or removing a bridge, in order to save the expense of maintaining it. *Board, etc., v. Legg*, 93 Ind. 523 (47 Am. Rep. 390); *Board, etc., v. State, ex rel.*, 113 Ind. 179.

How can it be said that the county commissioners may only cause a bridge to be repaired in case, in their opinion, the public convenience requires it, if it is within the province of the courts to compel them by mandate to repair, even though, in their opinion, the public convenience does not require it?

The duty of county commissioners to cause all bridges to be kept in repair, so as to prevent injury to persons travelling upon the public highways of which they form an essential part, is in no sense discretionary. That is an absolute obligation, designed for the safety and protection of the public. So, if the use of a public highway, which constituted the only reasonably available means of public communication, was substantially destroyed by the failure to repair a bridge,

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The State, *ex rel.* Shryer *et al.*, v. The Board of Comm'rs of Greene County.

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the question then would not be one of public convenience, but of practical necessity. Doubtless cases might arise in which it would be the imperative legal duty of the commissioner to afford the means, or take the necessary steps, to make the repairs. *State, ex rel.*, v. *Demaree*, 80 Ind. 519; *State, ex rel.*, v. *Board, etc.*, 80 Ind. 478.

The facts found fall far short of making the present such a case. For all that appears, the stream may be crossed by means of a ford, or ferry, or another bridge—as the evidence shows the fact to be—may have been built within a reasonably convenient distance from the one destroyed.

Mandamus is an extraordinary remedy, the writ being one of the highest known to the law, and it only issues against a public officer or tribunal when the law imperatively enjoins the performance of a specified act or duty which the officer or tribunal refuses to perform.

There is no proposition more firmly settled than that where official action depends upon the exercise of the judgment and discretion of the officer, courts can not interfere to dictate how the officer shall act, or what judgment he shall give. High Ex. Leg. Rem., section 42, *et passim*. As long as there is any room for reasonable doubt as to whether or not a matter depends upon the result of an inquiry or investigation into the facts, or which involves the hearing and consideration of evidence which is to control the action of the officer or tribunal, courts will not undertake to review the conclusion or judgment collaterally, in a mandamus proceeding, after the officer or body has acted. *Holliday v. Henderson*, 67 Ind. 103; *People v. Common Council*, 78 N. Y. 33.

It appears, from the facts found, that the board of commissioners, in the exercise of its discretion, refused to order the bridge repaired. The present is, therefore, not a case where the commissioners refused to act, but is one in which they did not act in a manner to suit the relators, who now ask the court to compel them to reverse their former action. This can not be done by mandamus proceedings. This case

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Milner *et al.* v. Bowman *et al.*

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is fully within the principles which controlled the judgment in *Board, etc., v. State, ex rel., supra.*

The evidence sustains the verdict, and there was no error in admitting evidence to show the amount it would cost to repair the bridge, and the condition of the finances of the county. It may be that the bridge ought to be rebuilt, but that is a matter for the determination of the county commissioners, to be determined in view of the public convenience, and the condition of the county treasury.

The judgment is affirmed, with costs.

Filed June 22, 1889.

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No. 14,495.

MILNER ET AL. v. BOWMAN ET AL.

119	448
150	646

119	448
160	195

LIFE INSURANCE.—*Benefit Society.*—*Change of Beneficiary.*—*Vested Interest.*—

Where a certificate issued by a benefit association is payable to the heirs or legal representatives of the member, such beneficiaries have no vested interest prior to the death of the insured, and the latter may designate another beneficiary at any time during his life.

SAME.—*Assignment of Certificate.*—Where a member of a benefit association has a right to change the beneficiary named in his certificate, and no prescribed mode of making the change is shown, an assignment of the certificate, with directions to the association to pay the proceeds to the assignee, effects a change.

SAME.—*Insurable Interest.*—Every person has an insurable interest in his own life; and if one procures insurance upon himself and pays the premiums, it is immaterial whether or not the beneficiary designated by him, or the assignee of the policy, has an insurable interest in his life.

SAME.—*Vested Interest.*—*Death of Beneficiary*—*Descent.*—Where beneficiaries, having a vested interest in a policy of insurance, die before the insured, who is their sole heir, the latter acquires their interest by in-

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Milner *et al.* v. Bowman *et al.*

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heritance, subject only to the claims of the beneficiaries' creditors, and may assign the same.

**SAME.—Assignment by Insured.—Insolvency.**—The fact that an insured is insolvent at the time of his death, does not affect the validity of an assignment of the policy made by him at a time when he was solvent.

From the Marion Circuit Court.

*T. Hanna*, for appellants.

*A. Baker, E. Daniels, D. M. Bradbury, S. J. Peelle and E. Marshall*, for appellees.

**OLDS, J.**—Sylvanus Milner, an unmarried man, was a master mason, and, on the 16th day of November, 1872, he became a member of the Masonic Mutual Benefit Society of Indiana, a corporation organized for charitable purposes. The object of the corporation, as stated in its articles of incorporation, is "to give financial aid and benefit to the widows and orphans and dependents of deceased members."

The association issued to the said Sylvanus a certificate of membership, under its corporate seal, and signed by its officers. The certificate is payable "to the heirs of the said Sylvanus Milner, or the legal representatives of the said Sylvanus Milner." At the date of the issuing of the certificate, the mother and brother of Sylvanus were living, and were at that time his only heirs at law. At that date his mother lived with him, and continued to live with him until her death, in 1876, and was dependent upon him for her maintenance, and he supported her during all of that time. The brother died intestate, a resident of Indiana, in 1876, without issue or descendant, leaving no widow, and leaving as his only heirs at law his mother and brother Sylvanus, the assured. His estate has been fully settled, and all of his debts have been paid. Afterwards, in the same year, his mother died intestate, a resident of Indiana, leaving no husband and no children or descendant except Sylvanus, the person whose life was insured by this certificate, her only heir at law. Her estate has been fully settled and all her

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*Milner et al. v. Bowman et al.*

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debts have been paid. In 1877, after the death of his mother, Sylvanus Milner, by an endorsement thereon signed by him, directed the association to pay the proceeds of said certificate to the plaintiff, Clara J. Bowman. Milner paid all dues and assessments up to his death, keeping in force the membership and insurance. He died in 1885.

The plaintiff, Clara J. Bowman, brought this suit against the association, counting in her complaint on the certificate of insurance and the assignment and order endorsed thereon by Milner transferring it to her.

The association answered, admitting its liability in the sum of \$2,500, interpleading Rufus F. Larkin, the administrator of Milner, and Jesse Milner and others, the heirs at law of Sylvanus Milner, and paying the money into court. The amount was conceded to be correct, and the association was discharged by a proper decree of the circuit court.

The persons interpleaded all appeared, and the controversy proceeded between the plaintiff, Bowman, the heirs of Milner, and his administrator. Trial was had, resulting in a judgment and decree in favor of the administrator for the whole of the fund—the proceeds of the certificate. The heirs of Sylvanus Milner appeal, and by agreement between all the parties the cause is to be treated as if Clara J. Bowman had also appealed and filed a duplicate transcript, and no question is to be raised as to any informality in the manner of the appeal.

The question presented on this appeal is, which of the three claimants, as among themselves, has the better right to the proceeds of the certificate of insurance?

The plaintiff's complaint is in three paragraphs. Larkin, administrator, filed an answer and cross-complaint against plaintiff and Milner's heirs. Jesse Milner and others filed a demurrer to each paragraph of the complaint, which was sustained, and exceptions. Jesse Milner and others, heirs of Sylvanus Milner, demurred to the answer and cross-complaint of Larkin, administrator, and it was overruled, and excep-

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*Milner et al. v. Bowman et al.*

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tions. Jesse Milner and others, heirs of Sylvanus Milner, filed a verified cross-complaint against the plaintiff, Bowman, and Larkin, administrator, in two paragraphs. Larkin, administrator, filed a demurrer to each paragraph of complaint, which was sustained, and exceptions. Larkin, administrator, demurred to each paragraph of the cross-complaint of Jesse Milner and others, and it was sustained, and exceptions.

Jesse Milner and others filed an answer in three paragraphs to Larkin's cross-complaint, and Larkin demurred to the second and third paragraphs of the answer of Jesse Milner and others, which was sustained, and exceptions. Plaintiff, Bowman, demurred to each paragraph of the cross-complaint of Jesse Milner and others, and it was sustained, and exceptions. Plaintiff demurred to the cross-complaint of Larkin, administrator, which was overruled, and exceptions. Plaintiff, Bowman, filed an answer in general denial to Larkin's cross-complaint. Plaintiff, Bowman, refused to amend, and elected to stand by her complaint, and Jesse Milner and others, heirs of Sylvanus Milner, also refused to amend their cross-complaint.

The various rulings of the court, as stated, are each assigned as error. We do not deem it necessary to set out a synopsis of the pleadings in the case, as they are in the usual form, and no question is presented as to the particular allegations of them. As the association has waived all question as to its liability, and paid the money into court, it is unnecessary to determine any question as to its liability on the policy or the validity of the assignment as to the association.

Section 3850, R. S. 1881, provides that "All certificates of membership, policies, or other evidences of interest in any masonic, odd-fellow, or other benevolent or charitable association, society, or incorporation, named in section 1 of this act (section 3848), shall be regarded as a contract between the person whose life is insured by such certificate of membership, policy, or other evidence of interest, and the association, society, or incorporation of which he is a mem-

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ber ; and it shall be lawful for such association, society, or incorporation to change the name or names of the payee or payees, beneficiary or beneficiaries named in such certificate of membership, policy, or other evidence of interest, on such terms and conditions as the parties to the contract may agree to." Section 1 of the act (section 3848, R. S. 1881) relates to the same associations, and exempts such benefits from all claims of creditors.

In the case of *Masonic Mut. Ben. Soc., etc., v. Burkhardt*, 110 Ind. 189, it is said: "The general rule applicable to beneficiary or charitable associations is, that the beneficiary acquires no vested right to the benefits which are to accrue upon the death of a member, until the death of the member occurs."

In that case the member procured the cancellation of the original certificate, in which his wife was designated as the beneficiary, and procured the issuance of a new certificate, in which his son was designated as the beneficiary, without the knowledge or consent of his wife, the beneficiary in the original certificate, and on his death payment was made to the son, and it was held proper, and that the wife had no interest in the certificate. The authorities are collected in that case, fully supporting the conclusion of the court.

It does not appear in this case that the association in any way prohibited the changing of beneficiaries, or that it had any prescribed mode by which the change should be made. It follows, therefore, that the member had the right to change the beneficiary with the consent of the association. The member did change the beneficiary, by an assignment of the policy and directing the association to pay the same to the plaintiff, and she brings suit upon it. The association does not question this mode of making the change, or object to it, or refuse to pay the policy ; but when sued, other persons are claiming the fund, and it interpleads, and pays the money into court.

A policy of insurance may be assigned by the beneficiary



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or owner, and, when the beneficiary has no vested interest, it may be assigned by the member of the association. *Swift v. Railway, etc., Mut. Aid and Ben. Ass'n*, 96 Ill. 309; *Harley v. Heist*, 86 Ind. 196; *Lamont v. Hotel Men's Mut. Ben. Ass'n*, 30 Fed. Rep. 817.

In *Grand Lodge A. O. U. W. v. Child*, 38 N. W. Rep. 1, it was held that the member might change the beneficiary though the change was made against the refusal of the association, and not in conformity with the prescribed mode adopted by the association. *Knights of Honor v. Watson*, 64 N. H. 517; *Martin v. Stubbings* (Ill.), 18 N. E. Rep. 657.

We think the assignment operated as a change of the beneficiary, and made the plaintiff the beneficiary of the certificate; but, on the theory that the policy named a beneficiary, and the person or persons so named took a vested interest, it named the heirs of the insured, who were his mother and brother, and he inherited the interest they had, if any, before he made the assignment, and he had the right to assign such interest. *Harley v. Heist, supra*. It is contended that the doctrine held in the case of *Harley v. Heist, supra*, would entitle the administrator of Milner to the funds, but in this counsel are in error. In that case it was an ordinary life policy, in which the rights of the beneficiary were fixed, and it was the administrator of the beneficiary who recovered the funds, the beneficiary having died previous to the death of the insured without having assigned the policy. The insured, after the death of the beneficiary, assigned the policy, and it was held that the assignment passed the interest the insured inherited from the beneficiary, but it was subject to the payment of her debts, and her administrator was entitled to the money upon the policy.

If the mother and brother of Sylvanus Milner could be said to be beneficiaries with a vested interest, which descended to Sylvanus at their deaths, subject to the right of their administrators to collect the whole, it is shown that their estates are settled and their debts all paid; but in the

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certificate in this case the beneficiaries had no interest, and the insured had the right to change the beneficiary and designate another at any time during his life.

It is further contended that the plaintiff had no insurable interest in the life of the member, Milner, and therefore she derived no title by the assignment, and can not recover on the policy.

In this case the insured was the real contracting party, and paid all the premiums up to the date of his death, and every person has an insurable interest in his own life. When the person himself, in good faith, makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of authority. *Amick v. Butler*, 111 Ind. 578; *Hutson v. Merrifield*, 51 Ind. 24; *Provident, etc., Co. v. Baum*, 29 Ind. 236; *Burton v. Connecticut Mut. Life Ins. Co.*, ante, p. 207; *St. John v. American Mut. Life Ins. Co.*, 3 N. Y. 31 (64 Am. Dec. 529). See note to *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 92, 103, where the question is discussed and authorities are collected. *Clark v. Allen*, 11 R. I. 439 (23 Am. Rep. 496).

The cross-complaint of Larkin, administrator, alleges, in addition to the fact that the plaintiff had no insurable interest in the life of the insured, that Milner, the insured, was insolvent at the time of his death. This is a mere conclusion. If it was properly pleaded it would not affect the assignment, as it does not appear but that he was perfectly solvent at the time he made the assignment. It is contended by the appellants, the heirs of said Milner, that the words "heirs" and "legal representatives" of the insured should be held to mean the next of kin, and that the policy was payable at the death of Milner to his next of kin, the appellants. What we have heretofore said disposes of this question. The beneficiary took no vested interest during the

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The Brazil Block Coal Company v. Gaffney.

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lifetime of the member, and the member had the right to change the beneficiary, which he did by the assignment, and designated the plaintiff, Clara J. Bowman, as the person to whom the amount due on the certificate should be paid.

It follows from the conclusion we have reached that the court erred in sustaining the demurrers of Jesse Milner and others, the heirs of Sylvanus Milner, to each paragraph of the plaintiff's complaint, in sustaining the demurrers of Larkin, administrator, to each paragraph of the plaintiff's complaint, and in overruling the demurrer of the plaintiff, Bowman, to the cross-complaint of Larkin, administrator.

Judgment reversed, at costs of appellee Larkin, administrator, with instructions to the court below to proceed in accordance with this opinion.

Filed June 22, 1889.

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119	455'
165	298

No. 13,018.

THE BRAZIL BLOCK COAL COMPANY v. GAFFNEY.

**MASTER AND SERVANT.—Boy.—Character of Work to be Required of.—Legal Implication.**—Where a boy, without experience, is employed to perform labor, the character of the service to be required of him by the master is implied to be such as is within his capacity.

**SAME.—Instruction and Warning.—Liability of Master for Injury.**—If a boy, without being instructed or cautioned, is set to perform a service of which, on account of his immature age, he is incapable of appreciating the hazards, although visible, or if, being instructed and cautioned, his mind and strength are yet so immature that he is not capable of availing himself of the instruction and warning or of safely performing the service, the master is liable for injuries sustained by him.

**SAME.—Coal Mine.—Requiring Boy to Assist in Coupling Coal-Cars.**—Where a boy, ten years of age, employed by a coal mining company and as

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The Brazil Block Coal Company v. Gaffney.

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signed to work within his capacity at the top of the mine, is, without being instructed or cautioned, ordered by the person having control of the workmen at the top of the mine, or by a workman with the knowledge and consent of such person, to quit his regular work and assist in switching and coupling coal-cars, which he does, believing it his duty to obey, and while so engaged is injured, the master is liable.

**SAME.**—*Compulsion.*—*Complaint.*—*Demurrer.*—*Motion to Make Specific.*—

Where it is alleged that the plaintiff was “compelled” to do the act resulting in his injury, an objection that the facts constituting the compulsion are not stated can not be reached by demurrer, but only by a motion to make the complaint more specific.

**SAME.**—*Jury to Determine What Constitutes Compulsion.*—As to what would amount to compulsion where a boy ten years old is required, by men having authority to direct him, to perform a dangerous service, is a question for the jury.

From the Clay Circuit Court.

*G. A. Knight* and *A. W. Knight*, for appellant.

*J. A. McNutt* and *J. Q. Cornell*, for appellee.

**BERKSHIRE, J.**—There are two paragraphs in the complaint, the substance of each of which we will state. The substance of the first paragraph is as follows :

On the 2d day of July, 1885, the appellant was the owner and in possession of a certain coal mine, known as “No. 3,” and was on that day engaged in mining and removing therefrom large quantities of coal ; and to facilitate the removal of the coal mined from said mine, a switch had been built, connecting the said mine with the Vandalia railroad, which, together with certain cars that were on said switch for the purpose of receiving the coal that was being mined, was under the absolute control of the appellant, who on that day was engaged in loading, switching and coupling said cars, the said loading, switching and coupling being required in the removal of the coal that was being mined ; that the appellant kept in its employ at said mine one Thomas Young, who was its bank-boss, or mine superintendent, and who was, by virtue of his position and the authority conferred upon him, authorized and empowered to hire and discharge work-

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men at and about said mine, and given the management and control of all the work in and about the same, and to whom was delegated all the duties which the appellant owed to its employees, among which were the duties of keeping the said mine, its rooms and entries, in good and safe repair, to use reasonable diligence in the employment of careful and prudent workmen, to give them instructions concerning the subject of their employment and duties with respect to each other, and to caution young and inexperienced workmen of the risks to which they would be exposed in operating dangerous machinery, handling unsafe implements, or in performing work which would expose such persons to perils of which they had no knowledge. To assist said Young in performing his duties as an overseer of the workmen and work, one John Mushett was employed by and with the knowledge and consent of the appellant, and with like knowledge and consent was given the position of weighman, or weigh-boss, of said mine, and the immediate control of the workmen and work at and about the top of the same, including the management and control of the cars, and everything pertaining to them.

On the — day of —, 1885, the appellee was hired by the said Young (the contract being made with his mother, his natural and legal guardian), as a workman for the appellant, and was placed under the control of the said Mushett, and was assigned to the work of greasing bank-cars when elevated out of said mine, at a place called "Tipple;" that after the appellee, who was of very tender years, had been at work for the appellant for a number of weeks under the control of the said Mushett and subject to his orders, the said Mushett directed him to assist one Haines, who was also subject to the orders of Mushett, in switching the cars on said switch, and at the proper time to couple the same; that in giving the said order the said Mushett was acting in the line of his duty, and well knew that the appellee was very immature in years, without experience in, and physically un-

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able to perform, such work, which was very dangerous and specially hazardous, and at the time of the giving of said order to the appellee, or before, no warning was given him of its dangerous or hazardous character; and had the said Mushett, or any one else, cautioned the appellee, owing to his tender years (being but ten years of age) and the immaturity of his mind, he could not have retained the words of caution in his mind with sufficient distinctness to have performed such work with safety to himself; that the said Young wholly failed to give the appellee instructions concerning the scope of his employment or his relation to the other workmen at the time he was placed under the control of the said Mushett, and that such instructions were never given him at any time by any person; and in consequence of the failure of the appellant to do its duty in the respect named, the appellee, while assisting the said Haines in the attempt to couple the said cars, and while exercising that care and caution which might be expected of one so young, and without fault or negligence on his part, his left hand was caught between the cars and so bruised, crushed and mangled that amputation became necessary.

The second paragraph differs from the first, in that it alleges that the appellee was employed to do non-hazardous work, and charges that the work which he was doing was hazardous, and details the circumstances attending the accident, which are, in substance, as follows: That after the appellee had been in the employ of the appellant for some weeks, engaged in the performance of such work as came within his contract of hire, and subject to the control of the said Mushett, he was, with the knowledge and consent of the appellant, directed, ordered and compelled by one Haines, the leveller of said mine, and one of the employees of the appellant, and who was under the control of the said Mushett, and in the presence of the latter, and with his consent, knowledge and acquiescence, and while Haines and Mushett were acting within the scope of their employment, to quit

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his regular work and assist the said Haines and Mushett in coupling cars delivered on said switch for the purpose aforesaid, which work was dangerous and specially hazardous, and attended with great peril for one so young and inexperienced, and was no part of the work he had contracted to perform; that Haines well knew, when he required and compelled the appellee in the manner stated to engage in said work, of the dangerous character of the same, and knew his age and inexperience, and gave him no information, warning or caution, nor did anyone else.

Demurrers were overruled to each of these paragraphs of complaint, and exceptions reserved, after which the appellant answered in one paragraph, which was a general denial.

There was a jury trial, resulting in a verdict for the appellee, and, over a motion for a new trial, followed with the proper exceptions, judgment was rendered for the appellee.

Several errors are assigned, the substance of which is as follows:

1. The court erred in overruling the demurrer to the first paragraph of complaint.
2. The court erred in overruling the demurrer to the second paragraph of complaint.
3. The court erred in overruling the motion in arrest of judgment.
4. The complaint does not state facts sufficient to constitute a cause of action.
5. The court erred in overruling the motion for a new trial.

We need not consider the fourth error, as it is covered by the first and second. In our opinion both paragraphs of the complaint are good, and the court committed no error in overruling the demurrers.

The first paragraph of the complaint does not allege that the appellee was hired to perform non-hazardous work, or to perform labor of a particular kind or character; but the age of the appellee is stated to have been but ten years, that

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because of his tender age his mind was immature, and he was without experience.

Where a boy but ten years of age, and without experience, is employed to perform labor, the character of the labor to be required of him is implied; it is such as is within the compass of a boy's age and experience.

No one will contend, we think, that the master who employs a ten year-old boy, without experience, expects of him the same amount or kind of service that he expects when he employs a mature and experienced man. And that the appellant contemplated, when it took the appellee into its service, that he was to perform such labor as would be within his capacity, he was at first given a position down in the mine, but as soon as his extreme youth was made known he was given employment at the top of the mine, lighter and less dangerous in character.

Counsel for the appellant claim that the first paragraph of the complaint falls within the reasoning of this court in the case of *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282. We do not think so. It is true that the employee in that case was a minor, but he was nineteen years of age, a well developed and apparently strong man, and, to all appearances, as well qualified to understand and provide against the hazard or danger that would attend any kind of labor that he might have been called on to perform as if he had been an adult, and in the consideration of the case he is so regarded. We quote from the opinion :

“ In the case at bar the appellee does not claim in her complaint that her son did not have, notwithstanding his alleged non-age or minority, full knowledge of all the hazards of his employment. On the contrary, it appeared from the complaint that appellee's son was nineteen years of age at the time of his injury and death, and for some time previous had been an employee of the appellant in mining coal. It must be assumed, therefore, in the absence of any showing to the contrary, that he voluntarily engaged in driving



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the coal-cars through the avenues of the mine, with full knowledge of the dangers of the business. In such case neither the employee nor his mother, the appellee, could legally claim that on account of his infancy the appellant should be held liable for his injury and death caused, as alleged, by the negligence of his fellow servant. Although the appellee's son was a minor, under the age of twenty-one years, at the time he entered into the appellant's service, and at the time of his injury and death, yet it appeared that he was of sufficient age and experience to understand fully the hazard and dangers of the service, and therefore it must be held that by engaging in such service, notwithstanding his minority, he took upon himself the natural and ordinary risks incident to the business in which he was engaged, among which was the negligence of his fellow servants, whether of high or low degree, in the same common enterprise."

The proper distinction, as we think, is taken in the case of *Sullivan v. India Manufacturing Co.*, 113 Mass. 396. We take the following from the opinion of the learned judge in that case: "Though it is a part of the implied contract between master and servant (where there is only an implied contract), that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents therefore to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might, with reasonable care, and by reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground

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of complaint, even if reasonable precautions have been neglected. In the present case, the evidence of the plaintiff was that he went to work in the place pointed out by the defendants. He thus consented to the dangers attending the work, all of which was apparent; and, if he had sufficient knowledge and capacity to comprehend them, he can not now complain that such place might at moderate expense have been made safer. \* \* \* \* It may frequently happen that the dangers of a particular position for, or mode of doing work are great, and apparent to persons of capacity and knowledge of the subject, and yet a party from youth, inexperience, ignorance, or general want of capacity may fail to appreciate them. It would be a breach of duty on the part of the master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely, without instructions or cautions which he did not receive."

The following is from the opinion, delivered by HOAR, J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, which is a leading case: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw or might have seen the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the re-

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liance which he might have placed upon the direction of his employers." See *O'Connor v. Adams*, 120 Mass. 427.

In the case of *Rock v. Indian Orchard Mills*, 142 Mass. 522, which was a suit brought by a boy thirteen years old to recover for personal injuries, the court decided that it was the duty of the defendant to give suitable instructions to the plaintiff, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they were, of the employment in which he was engaged.

Where the master orders his servant, a child, into a service which he did not undertake to perform, and while in such service, the same being attended with peculiar hazard, the servant is injured while obeying the command, the master is liable. 2 Thomp. Neg., p. 976, sections 7 and 8.

In *Railroad Co. v. Fort*, 17 Wall. 553, Judge DAVIS delivered the opinion in the case, and as it is very much in point to the case under consideration we will quote from it at considerable length: "It is apparent, from the findings in the present suit, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption can not arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations

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arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons were concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason and can not receive our sanction. The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract and wholly disconnected with it. To work as a helper at a moulding machine, or a common work-hand on the floor of the shop, is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute. The father had the right to presume when he made the contract of service that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the directions of his superior, it might with some plausibility be argued that he should have disobeyed it, as he must have known that its execution was attended with danger. Or, at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. How could he be expected to know the peril of the undertaking? He was a mere youth, without experience, and not familiar with machinery. Not being able to judge for himself he had a right to rely on the judgment of Collett, and, doubtless, entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was

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perilous, and which any man of ordinary sagacity would know to be so. \* \* \* For the consequences of this hasty action the company is liable, either upon the maxim of *respondeat superior*, or upon the obligations arising out of the contract of service."

In the case of *Jones v. Old Dominion Cotton Mills*, 82 Va. 140 (3 Am. St. R. 92), the learned judge delivering the opinion of the court said: "In the case at bar, the plaintiff, a boy of thirteen years of age, with little experience and familiarity with machinery, and hired from his father by the defendant company 'to sweep, carry water, and fill the buckets with quills' in the weaving department of its cotton mills, was ordered into the position of danger already described, by one in the employment of the company, and, under the circumstances, on that occasion necessarily representing the company. When the injury occurred to this boy he was not doing the work his father engaged him to do. On the contrary, he was, at the time, employed in a service outside the contract and wholly disconnected therewith. To sweep, carry water, and fill buckets with quills, is quite a different thing from standing on a ladder and holding up a heavy belt, surrounded by the belts of four looms in dangerous proximity to his person, and these belts plying over pulleys making over a hundred and twenty revolutions per minute. The one is the work of a boy, and within the compass of a boy's strength and experience; the other requires the strength, experience and judgment of a man, and is a man's work, to say the least. Thus situated, holding up and aiding to adjust a displaced belt that ran a loom in the upper room, the plaintiff received the injury which makes him a comparatively helpless cripple for life. Neither he nor his father, when the contract of service was made, had any ground to expect that he would be called on to encounter any such peril. Eastwood, the second boss, was entrusted with the care, management and repair of the machinery, in connec-

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tion with the repairs of which this shocking accident occurred. He needed help to mend a broken belt and readjust displaced machinery. There was no one present in the room when the adjustment was to be effected except this boy, the plaintiff in error. Eastwood, by the usage of this company's employees, was not only empowered, but, in the nature of things, had authority to call to his assistance this boy, who never for a moment doubted his authority or hesitated to obey. In mending the belt, and readjusting the machinery, Eastwood was performing a plain duty he owed his principal, and was acting within the scope of his employment. Only four of the seven male hands ordinarily required to run the machinery of the weaving department were on duty that day, the others being absent on leave. In attempting to run the machinery with an insufficient number of hands, Eastwood was compelled, in the course of his regular duty, to call for help. He called this boy, and ordered him into a position of danger, the result of which was irreparable injury to him. In so doing, Eastwood was the representative of his principal, and his order, his negligent want of proper care and caution, was the negligent order and want of proper care of Eastwood's principal; and liability for the consequences can not be avoided by the contention that Eastwood had no authority and should not have given the order. The defendant company is liable on the plain principle of *respondeat superior*, Eastwood being then and there its *alter ego*. Wharton Law of Neg., section 232; *Malone v. Hathaway*, 64 N. Y. 5 (21 Am. Rep. 573). The company is also liable on the ground that by the act of its agent it exposed the boy to perils outside of the ordinary risks incident to his contract of service." *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago, etc., R. R. Co.*, 52 Ill. 401.

We extract the following from the note following *Fisk v. Central Pacific R. R. Co.*, 1 Am. St. Rep. 22, 28 (72 Cal. 38), which we adopt as expressing our views: "Notwithstanding some general declarations to the contrary, which may occa-

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sionally be found in the reports, there is no question that the law recognizes some distinction between the duty which a master owes his adult servant or employee, and that which he owes to an employee, who from his youth or inexperience, or other mental immaturity or infirmity, is not able, without instruction, to understand the perils to which he is exposed in the course of his employment. This distinction, as near as we can express it, is this: That as to the latter class of servants, the master must give them full instructions with respect to the dangerous character of the machinery with or about which they are employed, and of the means necessary to be used to avoid those dangers." See *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18.

In *Jones v. Florence Mining Co.*, 66 Wis. 268 (57 Am. Rep. 269), the learned judge delivering the opinion said: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." That case, in its facts, is very much like the case we are considering.

In *Dowling v. Allen*, 74 Mo. 13 (41 Am. Rep. 298), the conclusion of the court is stated as follows: "An inexperienced boy of seventeen, employed to work on visibly dangerous machinery, is entitled to warning of the danger from his employer." See *Smith v. Peninsular Car Works*, 60 Mich. 501 (1 Am. St. Rep. 542).

There is another class of cases where the master will not



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be relieved from liability for injuries to his servant, who is required to perform dangerous and hazardous work, even though the dangers and hazards of the work are open and visible, and warning and instruction are given, as when the servant is so young and inexperienced as not to be able to comprehend and guard against the dangers and hazards to which he is exposed. *Pittsburgh, etc., Ry. Co. v. Adams*, 105 Ind. 151.

In *Hickey v. Taaffe*, 105 N. Y. 26, the rule is declared to be as follows: "There is no doubt that in putting a person of immature years at work upon machinery which in some aspects may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution; merely going through the form of giving instruction, even if such form included everything requisite to a proper discharge of his duties by such employee, if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand, in fact, its dangerous character and be able to appreciate such dangers, and the consequences of a want of care, before the master will have discharged his whole duty to such employee." *Sullivan v. India Mfg. Co.*, *supra*; *Finnerty v. Prentice*, 75 N. Y. 615. But in the opinion from which we have last quoted the court further says: "If a person is so young that even after full instructions he wholly fails to understand them and does not appreciate the dangers arising from a want of care, then he is too young for such employment and the employer puts or keeps him at such work at his own risk."

In *Hill v. Gust*, 55 Ind. 45, the learned judge who wrote the opinion said: "This exposition of the law is based upon the theory that an employer is bound, under the law, to give a person of tender years, whom he employs, due caution, explanation and instruction, when he sets him to work in a dangerous and hazardous place. That the mere



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fact that he could have seen that such place was dangerous and hazardous, by exercising his faculty of sight, is not of itself sufficient evidence to hold an employee accountable for contributory negligence ; but that is a question for the jury to determine from all the facts." The mind of an inexperienced boy, who has but reached the immature age of ten years, is incapable of comprehending and guarding against dangers and hazards that attend the coupling of railroad cars, and he is without the physical strength required to perform the work successfully, and if directed by his employer, or those under whose direction and command he is placed, to perform such dangerous and hazardous work, and while thus engaged he suffers injury, the employer is liable. See *St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511 ; *Jones v. Old Dominion Cotton Mills, supra*.

As we have seen, it is alleged in each paragraph of the complaint that the appellee was placed under the control of one Mushett, who was the appellant's weigh-boss at the mine, and had control of all the workmen and work at and about the top of the mine, including the work on and about the cars delivered there to be loaded with coal ; and it is alleged in the first paragraph that Mushett ordered the appellee to assist Haines, who was also under his control, in switching the cars that were on the switch to be loaded, and were loaded, and at the proper time to make the couplings ; and in the second paragraph it is alleged that Haines, in the presence and with the knowledge, acquiescence and consent of Mushett, directed, ordered and compelled the appellee to quit his regular work and to assist them in switching and coupling the said cars.

We do not apply the rule which maintains in cases where one servant is injured because of the negligence of a fellow servant, and which was applied in *Brazil, etc., Coal Co. v. Cain, supra*, because, as we have seen, this case does not belong to that class ; nor do we rest our conclusion upon the maxim *respondeat superior*. Mushett (if not Haines), under the cir-

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cumstances of this case, was the agent of the appellant, and the superior of the appellee; it was his right to command, and the appellee's duty to obey, and, considering the immature age of the appellee, we must assume that he obeyed the commands of his superiors, supposing that it was his duty so to do, without regard to the dangers or hazards that he would encounter, and without a knowledge thereof.

It is said in the case of *Chicago, etc., R. W. Co. v. Bayfield*, 37 Mich. 205: "In this case Smith had charge of the train and of the men employed with it. In what he did, he was not purposely committing any wrong outside of the employment, but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose not to injure Williams but to advance the interest of the railway company. As between the company and any other than a fellow servant, there could be no question that his act should be deemed the act of the company. But we also think that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it, that the master is excused from responsibility; and a risk of this nature not being one of the kind the general rule applies, and he must answer for the misconduct of his agent." See *Lalor v. Chicago, etc., R. R. Co., supra*.

We take the following, which is very much in point, from *Dowling v. Allen, supra*: "Nor do we think that in this instance, King, who gave the plaintiff the order to stop the engine, was plaintiff's fellow servant. While it appears that Fisher was foreman of the establishment, King had charge of the construction of the turn-table, and Fisher directed plaintiff to go with King and do whatever he directed. \* \* \* Here King was foreman of the hands constructing the turn-table. They were under him, and the plaintiff was expressly ordered by Fisher to do whatever King told

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him." See *Jones v. Florence Mining Co.*, *supra*; *Jones v. Old Dominion Cotton Mills*, *supra*; *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261 (56 Am. Rep. 382); *Corcoran v. Holbrook*, 59 N. Y. 517 (17 Am. Rep. 369); *Railroad Co. v. Fort*, *supra*; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Chicago, etc., R. W. Co. v. Harney*, 28 Ind. 28; *Wood Master and Servant*, section 350.

The point is made that the facts constituting the compulsion alleged in the second paragraph are not set out, and that it was necessary to plead the facts.

We are of the opinion that the paragraph would have been sufficient had the word "compelled" been omitted, but were it not, the infirmity was not reached by a demurrer, but a motion to make more specific should have been made. This has been decided over and over again as to the charge of negligence, and we know of no reason why the rule should not be the same when a compulsive act is alleged. *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551, and cases cited.

What we have already said disposes of the third error alleged, that the court erred in overruling the motion in arrest of judgment.

We have examined the instructions given by the court of its own motion, as well as those asked for by the appellant and given, and our conclusion is that if any error is to be found therein, the appellant was the party benefited, and has no cause to complain.

One suggestion made by appellant's counsel in reference to the sixth instruction we will notice specially. It is contended that the instruction relates to the second paragraph of the complaint altogether, and to the act of compulsion therein alleged, and that it must have misled the jury, for the reason that there was no evidence introduced tending to show compulsion. Giving to the word "compelled" the definition contended for by counsel, and remembering the age of the appellee, and that he was in the presence of two stalwart men and under the control and command of one.

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of them, we think it was a question for the jury as to what would amount to compulsion. Evidently it would not require the exercise of as great will power to compel obedience on the part of a boy ten years old as would be necessary in the case of a strong, stalwart man.

We are not prepared to say that the preponderance of the evidence was with the appellee, if we are governed by the number of witnesses on either side and the ground covered by their testimony ; but the weight of the evidence and credibility of the witnesses were questions (1) for the jury, and (2) for the court in which the case was tried.

The appellee testified that he was never instructed as to the manner of coupling cars or its dangers ; that Mushett and Haines both, on the occasion in question, told him to knock out the block and couple the cars. That he received his injuries while coupling cars at the mine, and during the time he was in the employment of the appellant, is not controverted.

We find no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

COFFEY, J., took no part in this case.

Filed June 25, 1889.

Board of Comm'rs of Hancock Co. v. The State, *ex rel.* Michener, Att'y Gen'l.

No. 14,078.

BOARD OF COMMISSIONERS OF HANCOCK COUNTY v. THE  
STATE, EX REL. MICHENER, ATTORNEY GENERAL.

**TAXES.—Delinquency.—Penalty.—Becomes a Part of Tax.**—The ten per centum penalty assessed for the non-payment of taxes, under the statutes of this State, is not imposed solely as a punishment of the delinquent taxpayer, or intended to constitute a separate fund, but it attaches to and becomes a part of the taxes; and accordingly the penalty assessed on taxes levied for county purposes belongs to the county, and the penalty assessed on taxes levied for State purposes belongs to the State.

From the Hancock Circuit Court.

*E. Marsh* and *W. W. Cook*, for appellant.

*L. T. Michener*, Attorney General, and *A. C. Harris*, for appellee.

**COFFEY, J.**—This cause originated before the board of commissioners of Hancock county. Upon appeal to the circuit court the appellee filed an amended complaint in which he avers that heretofore, to wit, in the years 1883, 1884, 1885 and 1886, the treasurer of Hancock county wrongfully paid and delivered to the said county, of the penalties on delinquent taxes by him collected in said county, in said years, as follows, to wit:

1883 . . . . .	\$530 20
1884 . . . . .	454 16
1885 . . . . .	520 21
1886 . . . . .	414 28
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Total . . . . .	\$1,918 85

That the amounts named were due to the State of Indiana and not to the county of Hancock; that the said treasurer paid and delivered said sums to the county, as being due to her for penalties collected on delinquent taxes as aforesaid, and did not pay any part of said sums to the State of In-

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Board of Comm'rs of Hancock Co. v. The State, *ex rel.* Michener, Att'y Gen'l.

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diana in any manner or form, but only paid the State such portion of said penalties as equalled the amount of penalties collected as the *pro rata* share of the State in the whole amount of the delinquent taxes collected in said year, and no more; that the said sums are due and unpaid; that payment of the same was demanded by the plaintiff before the commencement of this suit, but was refused by the defendant, and that this claim has not been collected or sued for by any other officer.

A demurrer to this complaint, for want of sufficient facts to constitute a cause of action, was overruled by the circuit court and the appellant excepted. Failing and refusing to plead further, judgment was rendered against the appellant for the amount claimed.

The errors assigned here are: 1st. That the complaint does not state facts sufficient to constitute a cause of action. 2d. That the circuit court had no jurisdiction, and 3d. That the court erred in overruling the demurrer of the appellant to the complaint.

It is claimed by the appellant that the penalty assessed for the non-payment of taxes was intended by the Legislature as a compensation to the several funds for the increased expenditures made necessary by its non-payment at the time fixed by law, and is to be added to and to become a part of such tax; while on the other hand, it is contended by the appellee that such penalty is intended as punishment of the delinquent, and that such penalty when collected belongs to the State, and should be paid into the State treasury under the provisions of section 4926, R. S. 1881.

Section 6426, R. S. 1881, provides that any person charged with taxes on the tax duplicate in the hands of the county treasurer may pay the full amount of such taxes on or before the third Monday in April, or may, at his option, pay the first instalment on or before such third Monday, and the remaining instalment on or before the first Monday in November following. In all cases where the first in-

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stalment shall not be paid on or before the third Monday in April, the whole amount unpaid shall become due and be returned delinquent, and collected as provided by law; and there shall be a penalty added of ten per cent. upon the amount of any instalment not paid when due, which the persons or property assessed shall pay, together with costs of collection; and if such taxes remain delinquent at the succeeding first Monday in November, there shall be a penalty of six per centum added to all such taxes that became delinquent at the preceding April and November settlements, and a penalty of ten per cent. only shall be added to the current delinquency occurring on the first Monday in November.

Section 6427 requires the county treasurer, after the third Monday in April, to make out a delinquent list, with the amount due from each delinquent taxpayer, with a separate column headed "Return," to the correctness of which list the county auditor shall certify. This certified list has the same force and effect as an execution.

The treasurer is required to visit the residence of each such delinquent in the county, either in person or by his deputy, and make demand for the amount of such delinquent taxes, and the penalty thereon, and if the taxes and penalty are not paid he is required to levy upon sufficient personal property to satisfy the same, if so much can be found. In case such delinquent tax and penalty is paid upon demand, such treasurer shall charge and receive from such delinquent, in addition to the tax and penalty, the sum of twenty-five cents.

Section 6457 requires the county auditor, between the first Monday of December and the first Monday of January, annually, to make out and record, in a book provided for that purpose, a list of lands and lots remaining delinquent, describing such lands and lots as they are described on the tax duplicate, and charge them with the amount of delinquent taxes, with interest and a penalty of ten per centum on such taxes, and with the taxes of the current year, including current and delinquent taxes on personal property.

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Sections 6458 and 6459 provide for the advertisement and sale of such lands and lots for the payment of such delinquent taxes, penalty, interest, and the costs made in such sale.

Section 4926, R. S. 1881, provides that the general funds of the State shall consist of: 1. The moneys, debts and property belonging to the treasury proper, together with the increase and revenue thereof. 2. Moneys derived from the sale of lots in the city of Indianapolis. 3. Penalties and forfeitures not specifically appropriated. 4. Moneys received from copies of laws sold. 5. All moneys paid into the treasury and not specifically appropriated to any other fund. It is under this last section that the appellee claims the money now in dispute.

As to whether the State is entitled to the money named in the complaint depends upon whether the penalties referred to in the different sections of our tax law above cited attach to and become a part of the taxes assessed, or whether they are to be regarded as a mere punishment of the delinquent taxpayer, and remain separate and apart from the taxes. As will be observed by reading these provisions of our tax law, in each instance, except in section 6457, where the penalty is provided for, it is declared that such penalty shall be *added* to the tax. The words "add to" are generally understood to mean, "to increase." Webster defines the word "add" as meaning to join or unite, as one thing, or some to another, so as to increase the number, or augment the quantity, enlarge the magnitude, or so as to form one aggregate. So, when the Legislature speaks of adding to a tax a penalty of ten per cent., it would generally be understood that it was intended to increase such tax in that amount.

The precise question involved here has never to our knowledge been decided by this court, but has been passed upon by other courts in the Union. In the State of Kansas there is a statute similar to the one now under consideration. In the case of *State v. Bowker*, 4 Kan. 114, it was held that the ten per cent. penalty assessed for the non-payment of taxes,



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within the time prescribed by the law, attached to and constituted a part of the tax.

In the case of *Kansas, etc., R. W. Co. v. Amrine*, 10 Kan. 318, the court adhered to the doctrine announced in the case of *State v. Bowker, supra*; so that this doctrine seems to be firmly settled in the State of Kansas.

In the case of *State v. Huffaker*, 11 Nev. 300, the precise question involved in this case was decided. In that case the treasurer had collected a penalty of \$5,564.28, being a penalty fixed by law for the non-payment of taxes within a given time; the State claimed the whole amount upon the ground that it was assessed as a punishment of the delinquent taxpayer, but BEATTY, J., who delivered the opinion of the court, said: "This penalty of twenty-five per centum is assessed upon the aggregate amount of taxes due to the State and county, of which five-thirteenths were due to the State, and eight-thirteenths to the county. The law makes no express disposition of the penalty, and it becomes a question of construction what disposition of it the Legislature intended. We think the penalty is to be regarded not only as a punishment to the delinquent, but also, and principally, as a compensation to the State and county for the delay of payment, and the consequent derangement of their finances. So regarded, the obvious conclusion is, that the penalty follows the tax, in this case five-thirteenths to the State and eight-thirteenths to the county."

Following the language used in our tax law, and the construction placed upon such language by the decisions above cited, we have reached the conclusion that the ten per cent. penalty assessed for the non-payment of taxes under our law attaches to and becomes a part of the tax. Under this rule, the penalty assessed on taxes levied for county purposes would belong to the county, while the penalty assessed on taxes levied for State purposes would belong to the State. *Davis, v. State, ex rel., post*, p. 555.

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Swiney v. The State.

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It follows that the circuit court erred in overruling the demurrer to the complaint in this cause.

The cause is reversed, with instructions to the circuit court to sustain the demurrer to the complaint.

Filed June 26, 1889.

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No. 12,040.

## SWINEY v. THE STATE.

**CRIMINAL LAW.**—*Affidavit Not Sworn to.*—*Motion to Quash.*—A paper purporting to be an affidavit charging the offence of assault and battery, but not sworn to, is bad on a motion to quash.

From the Howard Circuit Court.

*J. W. Kern* and *B. F. Harness*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

OLDS, J.—This is a prosecution for an assault and battery. The paper purporting to be an affidavit, upon which the prosecution is based, does not appear to have been sworn to. There was a motion to quash the affidavit, which was overruled, and exceptions, and the ruling is assigned as error.

It is contended by counsel for the State that the objection that the affidavit was not sworn to is not presented by a motion to quash. We think it is. A motion to quash reaches all defects apparent on the face of the affidavit or indictment. *Cooper v. State*, 79 Ind. 206; *Heacock v. State*, 42 Ind. 393; Whart. Crim. Pl. and Prac. (9th ed.), section 350; 1 Bishop

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Doyal v. Landes et al.

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Crim. Proc. (3d ed.), section 763; Maxwell Crim. Proc., p. 521.

In the case of *Cantwell v. State*, 27 Ind. 505, it was held that such a paper was no affidavit. See, also, *State Bank v. Hinchcliffe*, 4 Ark. 444, and *McDermaid v. Russell*, 41 Ill. 489, which hold the same.

The court erred in overruling the motion to quash.

Judgment reversed.

Filed June 26, 1889.

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No. 13,383.

DOYAL v. LANDES ET AL.

**MORTGAGE.—Foreclosure.—Disputed Ownership.—Judgment on Pleadings.—**

Where, in a suit to foreclose a mortgage, the mortgagor brings the amount due into court, the plaintiff is not entitled to a judgment on the pleadings against him until an issue joined between the plaintiff and another defendant as to the ownership of the mortgage is determined.

**BILL OF EXCEPTIONS.—Oral Testimony.—Stenographer's Report.—Must be in**

*Bill when Signed.*—The stenographer's report of oral testimony is not a written instrument within the meaning of the code, and can not be brought into a bill of exceptions by the use of the words "here insert," but must be incorporated in the bill before it is signed by the judge.

From the Montgomery Circuit Court.

*W. H. Thompson, J. West and W. P. Hart*, for appellant.

*T. F. Davidson, F. M. Dice, R. B. F. Peirce, W. T. Brush and T. L. Stillwell*, for appellees.

**ELLIOTT, C. J.**—The appellant's complaint is founded on a promissory note and the mortgage securing its payment executed to the appellant by Mary F. Landes and Chris-

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topher Landes. The complaint alleges that John and Miles Lane have possession of the note and mortgage, and that although they claim an interest in the note and mortgage they have none. Landes and Landes brought into court the sum they alleged to be due upon the note and mortgage, and prayed the court to determine who was entitled to the money. Lane and Lane asserted title to the note, and averred that it was transferred to them by delivery.

It is quite clear that the trial court did not err in overruling the appellant's motion for judgment against Landes and Landes on the pleadings. Until the issue made between the appellees Lane and Lane and the appellant was determined no judgment could be rendered, because it could not be adjudged to whom the money should be paid. But, aside from this consideration, the answer of Landes and Landes is good after verdict, for, conceding it to be defective in some particulars, the defects, if any, were such as a verdict would heal.

We are compelled to sustain the appellees' contention that the evidence is not in the record. It appears that the judge signed a skeleton bill of exceptions, in which the report of the evidence was not incorporated, but which contained at the appropriate place the words "here insert." The stenographer's report of the evidence can not be brought into the record in the method adopted. *Wagoner v. Wilson*, 108 Ind. 210; *Fahlor v. State*, 108 Ind. 387. The stenographer's report of oral testimony is not a written instrument within the meaning of the code, and it is only written instruments that can be brought into a bill of exceptions by the words "here insert." At common law the bill was required to be perfect in all its parts before the attestation of the judge. *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460, and authorities cited, p. 468. The reason for this rule is that the bill, when duly attested, imports absolute verity, and to have this effect the attestation of the judge must be to a bill containing all the oral evidence. It is the signature of the judge that gives

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the bill its force, and when it affirmatively appears, as it does here, that the oral evidence was not in the bill when it was signed, it can not be regarded as having passed the scrutiny of the judge. A skeleton bill is so incomplete as to be without force in any case where oral testimony is given.

Judgment affirmed.

Filed March 30, 1889.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—We have carefully examined the record as requested in the petition for a rehearing, but can find no reason for changing our opinion. The return of the clerk to the *certiorari* shows that the long-hand report was not part of the bill of exceptions at the time it was signed, because the stenographer's manuscript can not be incorporated in the record by reference and the use of the words "here insert." It must be incorporated in the bill before it is signed.

Filed June 26, 1889.

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No. 14,238.

MUHLER ET AL. v. HEDEKIN ET AL.

**CITY.—Common Council.—Power to Remove Officers.**—The common council of a city has power to remove a corporate officer, for neglect or violation of duty, whether such officer be elected by that body or by the people.

**SAME.—Water-Works Trustees.—Charges Against.—Power to Investigate.**—The common council has power to entertain and inquire into the truth of charges of malfeasance in office, preferred against trustees of the water-works, and to remove any or all of these officers for cause shown.

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**SAME.—Injunction.—When will not be Issued.**—It is not within the jurisdiction of a court of equity to enjoin the common council of a city from proceeding to hear and investigate charges preferred against water-works trustees, or other municipal officers, and from removing them from office.

**SAME.—Common Council not a Judicial Body.**—A common council is not a judicial body, and in the examination of charges preferred against a municipal officer, with a view to determine whether he shall be removed, and in removing him, it does not act judicially in such a sense as to subject its proceedings to the jurisdiction of a court of chancery, either by way of prohibition or injunction.

From the Allen Superior Court.

*H. Colerick* and *W. S. Oppenheim*, for appellants.

*A. Zollars*, *W. G. Colerick* and *A. A. Purman*, for appellees.

**MITCHELL, J.**—The plaintiffs, Hedekin, Kunkle and Meyer, instituted this proceeding against the common council of the city of Fort Wayne to enjoin the latter from investigating or hearing certain accusations made against the plaintiffs as trustees of the city water-works, and from removing them from their respective offices upon certain charges alleged to have been lodged with the common council against them. It is alleged in the complaint that controversies between the common council and the plaintiffs, as trustees, concerning the conduct of the water-works, had resulted in the preferring of certain false and unfounded charges of malfeasance and misconduct in office against the plaintiffs, as trustees, and that the common council had given them notice to appear, and that they were about to proceed to hear and investigate the charges so preferred, and that their purpose was to remove the plaintiffs from their respective offices as trustees of the water-works, to their irreparable damage, etc. The complaint abounds in general statements, to the effect that the common council was acting corruptly and unlawfully, and that the members were instigated by feelings of hostility, prejudice and malevolence, but these add nothing to its force or legal effect. The prayer of the complaint is that the de-

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fendants be restrained from hearing or investigating the charges, or from deposing or removing the plaintiffs from their respective offices.

The court gave judgment according to the prayer of the complaint. Two questions are presented for decision :

1. Has the common council of a city power to entertain and inquire into the truth of charges of malfeasance in office, preferred against trustees of the water-works, and to remove any or all these officers for good cause shown?

2. Is it within the jurisdiction of a court of equity to enjoin the common council of a city from proceeding to hear and investigate charges preferred against water-works trustees, and from removing them from office?

As necessary to the good government of municipalities, the power to remove officers of the corporation for reasonable and just cause was one of the common law incidents of all corporations. Accordingly, the better opinion seems to be that, in the absence of any express or implied restriction in the statute, a common council possesses the incidental power, for just cause, and under proper regulations, to remove a corporate officer, whether elected by it or by the people. 1 Dill. Munic. Corp., sections 240-242.

Regardless of what the rule of the common law may have been, the power of a common council in respect to the subject under consideration is not left in doubt, or to mere implication, by the statute. Section 3101, R. S. 1881, confers express authority upon the common council of a city for the expulsion or removal, by a two-thirds vote, of any member thereof, or of any officer of the corporation, whether elected or appointed, and requires the council to make provision in its by-laws or ordinances concerning the mode in which charges shall be preferred, and for the hearing thereof. This section has general application to all officers of the municipality, and must, therefore, include trustees of the water-works, as well as other officers charged with corporate duties.

The Constitution provides that "All State, county, town-

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ship, and town officers may be impeached, or removed from office, in such manner as may be prescribed by law." Section 8, article 6. This section imposed the duty upon the Legislature to make provision for the removal, for just cause, of all town officers, which means city officers as well. Of course an officer can only be removed for some specified neglect or violation of duty imposed or defined by law.

If anything were needed, in addition to the above statute, to make it certain that trustees of the water-works were amenable to the common council for misconduct in office, it is found in section 3278, R. S. 1881, which provides that the common council shall be authorized, through a committee, to investigate the books and papers, together with all matters pertaining to the management of the water-works, and in case of neglect of duty or malfeasance on the part of any officer connected therewith, to remove the officer so offending. We agree that the trustees of the water-works are, in some respects, independent of the common council, so far as the management and control of the water-works is concerned, but they are, as we have seen, nevertheless answerable to, and liable to removal by, the council for official delinquency and malfeasance in office. *City of Madison v. Korbly*, 32 Ind. 74.

This brings us to consider the second question. Assuming, as we must, that the council was about to proceed to investigate charges which had been preferred against the plaintiffs as individual trustees, and not as a board, in the mode provided by the by-laws or ordinances of the city, and that the hearing was to be had conformable to duly adopted by-laws or ordinances, it is at once clear upon principle and upon the most indubitable authority that it was not within the jurisdiction of the court to arrest its proceedings by injunction. Courts of chancery are not invested with power over the subject of removals of public officers, no matter in whom the power to make removals is vested. The subject-matter of their jurisdiction relates to civil property. Injury



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to property, actual or threatened, is the foundation to chancery jurisdiction. It is not concerned with matters of a political nature. *Sheridan v. Colvin*, 78 Ill. 237; 2 High Injunc., section 1312. The general principle that equity possesses no power to revise, control or correct the action of public, political or executive officers or bodies, is, of course, well understood. It never does so at the suit of a private person, except as incidental and subsidiary to the protection of some private right, or the prevention of some private wrong. *Judd v. Town of Fox Lake*, 28 Wis. 583; *Pedrick v. City of Ripon*, 73 Wis. 622.

An officer who has been wrongfully removed by a common council, acting without authority, may have a remedy by mandamus to be restored to the possession of the office from which he has been illegally removed. *State v. Common Council*, 9 Wis. 254.

We are not, however, aware of any case in which it has been held that a court of chancery might entertain a bill to enjoin the removal of a municipal officer against whom charges of misconduct in office had been preferred; on the contrary, the authorities uniformly hold that proceedings in the nature of an official inquiry concerning the conduct of an officer, by a common council or other body having cognizance of the subject, the possible end being the removal of the officer, are wholly beyond the control of a court of equity. Thus, in *In re Sawyer*, 124 U. S. 200, as is correctly stated in the head-note, it was held that the circuit court of the United States had no jurisdiction or authority to entertain a bill in equity to restrain the mayor and committee of a city in Nebraska from removing a city officer upon charges filed against him for malfeasance in office, and an injunction issued on such a bill, as well as an order committing the defendants for contempt in disregarding the injunction, was absolutely void. So, in *Dougan v. District Court, etc.*, 22 Am. Law Reg. 528, where it appeared that a city council was proceeding to investigate charges with a view of re-

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moving an officer, it was held that an order of court staying proceedings, and to show cause why a writ of prohibition should not issue, was beyond the jurisdiction of the court, and, therefore, void. In the application of like principles, it was held in *Delahanty v. Warner*, 75 Ill. 185, that a court of chancery had no jurisdiction to entertain a bill for an injunction to restrain the mayor and aldermen of a city from unlawfully removing the plaintiff from the office of superintendent of streets. See, also, *Smith v. Myers*, 109 Ind. 1; *Cochran v. McCleary*, 22 Iowa, 75; *Sheridan v. Colvin*, *supra*; *Poyer v. Village of Des Plaines*, 123 Ill. 111; *Beebe v. Robinson*, 52 Ala. 66; *Moulton v. Reid*, 54 Ala. 320.

The effect of the restraining order in the present case was to command the common council to suspend all further proceedings in the matter which they were about to inquire into. This was, in substance and effect, a writ of prohibition, the office of which, according to Blackstone, is to command the judge and parties to a suit, in any inferior court, "to cease from the prosecution thereof, upon the suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court." *Board, etc., v. Spitler*, 13 Ind. 235; *State v. Gary*, 33 Wis. 93; High Ex. Leg. Rem., sections 762-769. While the order was nominally an injunction or restraining order, it was, in essence and effect, when issued, a writ of prohibition, which was and is only issuable to an inferior tribunal while acting in a judicial capacity, and not to a person or tribunal while engaged in the exercise of merely administrative or ministerial functions which in no way affect property rights. *Home Ins. Co. v. Flint*, 13 Minn. 244. A common council is not a judicial body, and in the examination of charges preferred against a municipal officer, with a view to determine whether he should be removed, and in removing him, it does not act judicially in such a sense as to subject its proceedings to the jurisdiction of a court of

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chancery, either by way of prohibition or injunction. The acts of a common council in that regard are merely the exercise of political power, and are administrative or ministerial in character, and so long as acts of that nature are within the discretion committed to that body, or do not cast a cloud upon, or affect the title to civil property, or interfere with individual property rights, the officers are not subject to the control of the court by the exercise of its restraining or prohibitory power. *Donahue v. County of Will*, 100 Ill. 94.

We by no means intend to assert that the duty may not be imposed upon the courts to determine whether or not the common council of a city may not have acted outside of its authority, when it has assumed to act upon matters not entrusted to it; or that courts will not in proper cases, and on proper application, restrain all inferior officers and bodies, and compel them to act within the limits of the law, when such officers or bodies are assuming to act upon matters not committed to their discretion; nor do we hold that an officer unlawfully removed or interrupted in the discharge of his official duties is remediless. What we mean to assert is, that acts that are within the discretion of the governing body of a city, or acts which are absolutely void and do not in some way affect or threaten individual property rights, or the interests of taxpayers, are not subject to the control of courts of chancery. If, therefore, it were conceded that the common council of a city was about to proceed to hear charges preferred against an officer over whom it had no power or control whatever, with a view of adopting a resolution looking to his removal or expulsion from office, a case would not be presented for the exercise of the chancery powers of the court. Such a resolution would be without any effect whatever, and the law affords adequate means for the protection of one in office against mere harmless assumptions, such as that supposed, without resorting to a court of equity.

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In every aspect in which the case may be considered, the order of the court was in excess of its jurisdiction.

The judgment is, therefore, reversed, with costs.

Filed March 26, 1889; petition for a rehearing overruled June 26, 1889.

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No. 14,959.

BENSON v. THE STATE.

**CRIMINAL LAW.—*New Trial.—Error in Admitting Evidence.***—A cause assigned as a reason for a new trial, that the court erred "in permitting evidence to be given to the jury which was incompetent," is too indefinite to present any question on appeal.

**SAME.—*Confession under Inducement.—Evidence.***—Where an officer visits in prison one accused of murder, and says to him, "There is only one way out of this, and that is, tell the truth," whereupon the accused confesses the killing, the officer's remark is merely an inducement, and not a threat, and under section 1802, R. S. 1881, the confession, with all the circumstances, may be given in evidence.

**SAME.—*Murder.—Motive.—Evidence of Assault upon Other Person.***—Upon the trial of one accused of murder, evidence of an assault, and its character, upon the wife of the deceased, following closely after the killing of the husband, is competent as tending to show the motive which led to the crime, where the theory of the prosecution is that the accused supposed the husband and wife were obstacles in the way of his marriage with a girl residing with them.

**SAME.—*Unsoundness of Mind.—Evidence of Motive Consistent with Sanity.***—Where one charged with murder introduces evidence to prove that he was of unsound mind when the crime was committed, any evidence on the part of the State tending to show a motive for the killing, consistent with reason and soundness of mind, is competent, and the fact that it was permitted to be introduced in chief instead of in rebuttal is not available error.

**SAME.—*Instructions.—Time of Asking.***—An instruction asked after the argument has closed comes too late, and it is not error to refuse to give it.

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Benson v. The State.

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**SAME.—Refusal of Duplicate Instruction.**—Where the court gives an instruction covering a given subject, it is not error to refuse to give another instruction asked by a party upon that subject.

From the Clark Circuit Court.

*J. B. Meriwether* and *L. A. Douglass*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

**BERKSHIRE, J.**—The appellant was indicted for the crime of murder, in the first degree, in the Floyd Circuit Court, the particular crime charged being the murder of Jacob Mottweiler.

On appellant's motion there was a change of venue granted to the Clark Circuit Court, where the case was tried and the appellant convicted of the crime charged and sentenced to be hanged.

The errors assigned are: 1. The court erred in overruling the motion to quash the indictment. 2. The court erred in overruling the motion for a new trial.

We can discover no valid objection to the indictment; it contains all of the usual and necessary averments ordinarily found in an indictment for murder in the first degree.

The motion for a new trial contains four reasons: 1. Error of law occurring at the trial in permitting evidence to be given to the jury which was incompetent. 2. Error committed in the instructions given to the jury. 3. Error committed in the refusal to give instructions asked for by the appellant. 4. Because the verdict of the jury is contrary to law and to the evidence.

The first error assigned is too indefinite to present to this court any ruling of the court below overruling objections to the admission of evidence. The court's attention should have been called to the particular evidence objected to in the motion for a new trial. *Miller v. Lebanon Lodge*, 88 Ind. 286; *State, ex rel., v. Riggs*, 92 Ind. 336; *Ireland v. Emerson*, 93 Ind. 1; *Wallace v. Kirtley*, 98 Ind. 485; *Louisville*,

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*etc.*, *R. W. Co. v. Thompson*, 107 Ind. 442; *Stout v. State*, 90 Ind. 1.

The last case cited was a conviction for murder in the first degree, and the reasons assigned were very similar to the first reason embraced in the motion under consideration. But in view of the importance of the case we will consider the rulings of the court to which objection is made in appellant's brief.

The State was allowed to prove on the trial certain confessions made by the appellant, over his objection.

The following section of the statute, R. S. 1881, section 1802, controls the admission and weight of this class of evidence: "The confession of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear, produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

There is no evidence of any threats to force confession from the appellant. The most that was said to him was by Smithwick, a policeman, at the county jail. He testifies: "I saw Benson at the jail, in New Albany, the day after the killing, about 10 A. M.; officer Cannan was with me; I got a key and went in; Benson was at the upper end of the corridor of the jail; he said he did not kill Mottweiler; he had told Sallie Snyder what he had done, and they then went to Gresham's; afterwards Mr. and Mrs. Mottweiler were found; said he didn't know who hurt them; said he saw Uncle Jake lying dead, and saw a man's legs in underbrush. I said: 'Benson, there is only one way out of this, and that is, tell the truth.'" After this remark by Smithwick, the appellant confessed the killing. The remark of Smithwick was an inducement, but not a threat. The confessions and inducements were all before the jury, as provided in the section of the statute to which we have called attention.

Ellen Mottweiler testified as follows: "I am the widow

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of Jacob Mottweiler, deceased ; he was killed December 9th, 1888 ; Benson said that he and Sallie Snyder were going to get married ; the Monday before December 9th, 1888, he said it ; on November 5th, 1888, Benson said to my husband, ' Uncle Jake, I won't go to the election to-morrow unless you make me the promise you agreed to ;' when Benson said he and Sallie were to be married, I said, ' don't worry my husband about it, you can get married if you want to ;' then he said he had a good home for Sallie ; I had no other conversation with him about marrying Sallie ; on December 9th, 1888, Benson went out to hunt ; he and Mottweiler were on good terms that day, talking and laughing ; Benson was out in the morning, called Mottweiler out ; stayed a short time and they came back laughing ; Mottweiler did not notice Benson take the gun ; when he went out in the afternoon Benson took the gun ; I went out to milk about half past 4 o'clock ; I was hurt, and did not know anything for seven weeks ; I did not know that my husband was dead for more than seven weeks after his death." (Here the prosecuting attorney asked Mrs. Mottweiler to describe the nature and extent of her wounds, and exhibit them on her person.)

The appellant objected to the witness testifying in answer to the question, but the court overruled the objection, and the witness testified as follows : " I was milking when I was knocked down. I don't know by what or by whom. I did not remember anything until long after December 24th, 1888, the day before Christmas. I then found wounds on my head and on my temple, one behind my ear, and my jaw-bone broken. I have not recovered from them, as you see."

The theory of the State in the prosecution was, that the appellant was over-anxious to marry Sallie Snyder, a young lady who resided with the deceased and his wife, and that she had refused him, placing her refusal upon the ground that she would not enter into the marriage relation so long as they were living, and that the motive which led to the

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Benson v. The State.

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crime was to remove the obstacle which he imagined stood in the way of his marriage with the young lady named.

Upon this theory, any evidence having a tendency to prove the assault, and its character, upon Mrs. Mottweiler, following shortly the killing of her husband, was competent. But for another reason the evidence was competent, though probably more properly admissible in rebuttal, but, if so, its admission at an improper time was not an available error. The appellant introduced evidence with a view to proving that he was a person of unsound mind when the crime was committed. To meet this class of evidence any evidence tending to show a motive or purpose for the killing, consistent with reason and soundness of mind, was competent. If the appellant had determined that he would make Miss Snyder his wife, regardless of consequences, and that before he could succeed it was necessary that the deceased and his wife should die, an attack upon her, deadly in its character, after having taken the life of the deceased, was consistent with the method and purpose of a sound mind.

After the argument had closed the appellant asked the court to give the following instruction to the jury: "When considering this case, and affixing the punishment, if any is affixed, you should not consider the fact that the defendant injured Ellen Mottweiler, and let that control or influence the amount of punishment to be affixed for the killing of Jacob Mottweiler."

This instruction came too late, and therefore the court committed no error in refusing to give it. R. S. 1881, clause 6, section 1823; *Foxwell v. State*, 63 Ind. 539; *Surber v. State*, 99 Ind. 71; *Grubb v. State*, 117 Ind. 277.

But, conceding that the instruction states the law correctly, and supposing that it had been requested at the proper time, the court was only bound to give its equivalent. This the court did in its first instruction: "The offence charged is murder in the first degree in the killing of Jacob Mottweiler, and it is the only offence for which the defendant is



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on trial or should be considered by the jury." And when the court came to instruct the jury as to the different degrees of homicide covered by the indictment, and for either of which the defendant might have been convicted, they were particularly instructed as to the punishment applicable to each degree. We think the jury fully understood from the instructions that they could only affix a punishment adequate to the crime of killing Jacob Mottweiler, in case they found the appellant guilty of felonious homicide.

From the evidence, as we find it in the record, there is, in our judgment, no doubt but that the appellant slew the deceased. There was some evidence offered tending to show that the appellant was a person of unsound mind, but this evidence was of a very weak character, and had no weight with the jury. Assuming, as the jury found, that the appellant was a person of sound mind, the killing was in cold blood, and brutal in its character.

The deceased and his wife took the appellant into their home, treated and cared for him as a member of their family, as parents would treat a child, and in return therefor he takes the life of one of his benefactors and seriously wounds the other, though his design to kill her fails, for no other apparent reason than that the woman he wished to make his wife had said to him that so long as the deceased and his wife were living she would not enter into the marriage relation. There is not to be found connected with the crime one extenuating circumstance, and that the jury meted out the extreme penalty of the law indicates a willingness on their part to do their whole duty.

The judgment is affirmed.

Filed June 26, 1889.

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The State, *ex rel.* Kelley, v. Bonnell.

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No. 14,985.

## THE STATE, EX REL. KELLEY, v. BONNELL.

MANDAMUS.—*When Will Lie.*—The remedy by mandate can only be invoked in cases where a clear legal right is invaded, and where the writ is required to protect the petitioner from substantial injury.

SAME.—*License to Sell Intoxicating Liquors.—City.*—A vender of intoxicating liquors can not maintain an action for a mandate to compel a city treasurer to accept a license fee under an ordinance of the city, in order that he may, prior to the expiration of a license previously issued to him, demand of the city clerk a new license.

INTOXICATING LIQUORS.—*License.—Nature of.—Police Power.*—A license to sell intoxicating liquors is not a contract, but a restrictive special tax imposed in the exercise of the police power of the State, and it may be changed or even annulled by the Legislature whenever the public welfare demands it.

From the Montgomery Circuit Court.

*J. R. Courtney*, for appellant.

*W. T. Brush*, for appellee.

ELLIOTT, C. J.—The relator seeks to compel the treasurer of the city of Crawfordsville to accept one hundred dollars as a license fee under the ordinances of the city, in order that he may demand of the clerk the license required of persons engaged in the business of selling intoxicating liquors. The license issued to the relator does not expire until the 7th day of September, 1889, and the tender was made on the 24th day of May.

The complaint is bad. The municipal authorities were not bound to issue a license to a person having an unexpired license, and the treasurer had no authority to receive the money tendered by the relator. It may well be that, in the interval between the 24th of May and the 7th of September, the city might desire to change its ordinances to conform to the act of March 11th, 1889. Elliott's Supp., section 1684. It was proper, therefore, for the treasurer to decline to em-

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The State, *ex rel.* Kelley, v. Bonnell.

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barrass or complicate action by receiving the money tendered him. Or it may be that during that time changes may take place which would render it improper to issue a license to the relator. At all events, the relator has no such clear legal right as is essential to sustain a petition for a mandate.

The grant of a license would not preclude action by the municipal authorities, for a license is not a contract. A license may be changed or even annulled by the supreme legislative power of the State whenever the public welfare demands it. *McKinney v. Town of Salem*, 77 Ind. 213; *Martin v. State*, 23 Neb. 371; *Brown v. State* (Ga.), 7 S. E. Rep. 915; *State v. Isabel*, 40 La. Ann. 340. A license is a restrictive special tax, imposed for the public good, and in the exercise of the police power of the State. *Emerich v. City of Indianapolis*, 118 Ind. 279; *Mugler v. Kansas*, 123 U. S. 623; *Burnside v. Lincoln County Court*, 86 Ky. 423; *State v. Mullenhoff*, 74 Iowa, 271. As the power to grant, withhold or annul licenses to sell liquor is an exercise of the police power, it follows that no limitation can be placed upon its exercise by any statutory provision. It is a power incapable of surrender or annihilation. *McKinney v. Town of Salem, supra*; *State v. Woodward*, 89 Ind. 110; *Stone v. Mississippi*, 101 U. S. 814. It is evident that no right of the relator was invaded by the refusal of the appellee to accept the money tendered, since he could have acquired no legal right by securing the coveted license. He has, therefore, no right to a mandate, for that is an extraordinary remedy that can be invoked only in cases where a clear legal right is invaded, and the writ is required to protect the petitioner from substantial injury. *Burnsville T. P. Co. v. State, ex rel., ante*, p. 382.

Judgment affirmed.

Filed June 25, 1889.

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Walling v. Lewis, Administrator.

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No. 13,601.

## WALLING v. LEWIS, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Indemnifying Chattel Mortgage.—Execution and Sale.*

—*Conversion of Mortgaged Property.*—An administrator who has taken a chattel mortgage from an insolvent debtor to indemnify the estate against loss on account of the decedent having become surety for the mortgagor, may, without first paying the debt, maintain an action against an unsecured creditor of the mortgagor who has caused the mortgaged property to be seized and sold on execution in satisfaction of his claim.

SAME.—*Right of Administrator to Take Mortgage.—Order of Court.*—It is not necessary that an administrator should obtain an order of court to that end before taking a mortgage to indemnify the estate in his hands against loss.

DEBTOR AND CREDITOR.—*Fruits of Vigilance.*—One creditor has a right to obtain security for his claim, if it be honest, to the exclusion of other creditors.

From the Decatur Circuit Court.

*J. S. Scobey*, for appellant.

*J. K. Ewing and C. Ewing*, for appellee.

MITCHELL, J.—This was an action by Lewis, as administrator of the estate of Peter J. Bailey, deceased, against Walling and Barnes, the latter being a constable, in Decatur county, to recover damages for the unlawful conversion of certain goods and merchandise of which the plaintiff had taken possession in pursuance of the terms of certain chattel mortgages theretofore executed by one Alvin L. Bailey.

It appeared that Alvin L. Bailey had executed certain chattel mortgages to the administrator of the estate of Peter J. Bailey, to indemnify the estate against loss or liability on account of Peter J. Bailey having in his lifetime become bound as surety on certain notes, amounting to about \$1,600, which remained unpaid, which Alvin L. Bailey, who is alleged to be wholly insolvent, had executed as principal. The

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Walling v. Lewis, Administrator.

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mortgages were duly recorded. Walling recovered a judgment against Alvin L. Bailey, before a justice of the peace, and procured and directed Barnes, as constable, to seize and sell certain of the goods mortgaged and theretofore delivered over to the administrator. It is alleged that Walling purchased, took possession of, and converted the goods so sold by the constable to his own use, without paying any part of the mortgage debt. There was judgment in favor of Barnes, and against Walling, in the court below. The latter prosecutes this appeal, and urges various grounds for a reversal of the judgment. It is objected that it does not appear that the plaintiff below sustained any damage. Upon that subject the proof shows that the estate of Peter J. Bailey was liable to various parties, in whose favor claims had been allowed, amounting to over \$1,800, as surety for Alvin L. Bailey, who was shown to be insolvent. The administrator was in possession of the mortgaged goods at the time they were seized. The chattel mortgages vested the legal title in him, subject to the right of the mortgagor to redeem by performing the condition of the mortgages. *Lee v. Fox*, 113 Ind. 98, and cases cited. He has realized out of the goods not seized by the constable \$880, leaving the estate liable for about \$1,000 of security debts, with nothing out of which to be reimbursed. This shows that the estate has sustained damage by being deprived of part of the security which the administrator had taken as indemnity against loss. By the terms of the chattel mortgages, the principal agreed to pay the several debts upon which the intestate was surety, as they severally matured. It was shown that he failed to do this, and that judgment had been taken against the estate on account of those debts. It was not necessary that the administrator should have first paid the debts in order to show damage to the estate. *Reynolds v. Shirk*, 98 Ind. 480; *Catterlin v. Armstrong*, 101 Ind. 258.

The finding of the court is sustained by the evidence. It

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Walling v. Lewis, Administrator.

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was not necessary that the administrator should first have obtained the order of the court before securing indemnity for the estate of Peter J. Bailey from the mortgagor. It is the duty of an administrator to exercise the same care and vigilance in collecting or securing claims in favor of the estate of which he is the administrator, as a prudent man would in like matters in which he was personally interested. There was neither legal nor moral wrong in obtaining security for the liability of the estate, even though it may have been known at the time that the claim of the appellant would be postponed thereby. One creditor, whose claim is honest, is not bound to abate any degree of vigilance in obtaining security from his debtor, in order to give some other creditor an equal or superior chance to secure his claim. *Gilbert v. McCorkle*, 110 Ind. 215.

There is nothing in the evidence indicative of any fraudulent intent in the execution of the mortgages. The finding in favor of the constable, Barnes, affords no reason for the exoneration of the appellant, who converted the goods and applied them to the satisfaction of his judgment. *Nichols v. Nowling*, 82 Ind. 488.

Some objections to the rulings of the court in admitting and excluding evidence are suggested. We do not deem the questions of sufficient moment to state them in detail. The court committed no error in its rulings.

The judgment is affirmed, with costs.

Filed June 26, 1889.

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McGuire *et al.* v. The State.

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No. 14,847.

## McGUIRE ET AL. v. THE STATE.

119	499
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**APPEAL.—***Recognizance-Bond.—Judgment of Forfeiture.*—An appeal will not lie from an order declaring forfeited a recognizance-bond, executed for the appearance of the defendant in a pending criminal prosecution.

From the Fulton Circuit Court.

*M. L. Essick* and *O. F. Montgomery*, for appellants.

*L. T. Michener*, Attorney General, *C. P. Drummond*, *M. A. Baker* and *J. H. Gillett*, for the State.

COFFEY, J.—On the 24th day of October, 1887, Patrick McGuire and the other appellants herein entered into a recognizance, in the sum of two thousand dollars, for the appearance of the said McGuire in the circuit court of Fulton county on the second day of the next term of said court to be held thereafter, and at each succeeding term of such court thereafter, to answer the charge of murder, and to abide the order of the court until said cause was determined, and not to depart without leave.

At the November term, 1888, the said McGuire failed to appear, and he and his sureties were called and defaulted, but no formal judgment of forfeiture was entered. At the next succeeding term of said court the State's attorney moved for a formal judgment of forfeiture, when the appellants entered a special appearance, and resisted said motion, but the court sustained the motion of the prosecutor, and a formal judgment of forfeiture of said recognizance was entered, and the appellants excepted. They appeal to this court, and assign errors, while the State, by its attorneys, moves to dismiss the appeal, on the ground that the judgment declaring said recognizance forfeited is not a final judgment. This is now the only question for our consideration.

Section 1713, R. S. 1881, provides that in any criminal

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*McGuire et al. v. The State.*

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proceeding, when the defendant so desires, or the court in its discretion directs it, instead of the recognizance mentioned in the preceding section, the defendant shall be required to enter into a recognizance, with at least two sureties, one of whom shall be a freeholder of the county where the cause is pending, which recognizance shall be continuing, and the defendant shall not be required to renew it during the pendency of the proceedings, unless ordered to do so by the court for cause shown.

Section 1721 provides that if, without sufficient cause, the defendant neglect to appear for trial and judgment, or upon any other occasion when his appearance in court may be lawfully required according to the conditions of his recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited.

Section 1722 provides that the prosecuting attorney shall, as soon as such fact of forfeiture is entered, proceed by action against the bail upon the recognizance. Such action shall be governed by the rules of civil pleading so far as applicable.

Judgments rendered on such forfeited recognizances are declared by the statute to be liens from the commencement of the action thereon.

It will thus be seen that the default and entry of forfeiture involved in this case constitute a part of the proceedings in the criminal prosecution against McGuire. That prosecution, so far as we can determine by the record before us, is still pending. We know of no authority by which an appeal can be sustained from an order of the court declaring the recognizance of the defendant forfeited on his non-appearance to answer to the charge against him while the main case is still pending. It is not necessary that we should decide what would be the result of a motion to set aside the default, had such a motion been made and overruled. It is sufficient to say that no such motion was made. No final



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 Freeman v. The State.
 

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judgment could be rendered against the appellants on the recognizance until suit was brought upon it. In our opinion this appeal is not well taken.

Appeal dismissed.

Filed June 25, 1889.

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No. 14,954.

FREEMAN v. THE STATE.

**CRIMINAL LAW.**—*House of Ill-Fame.*—*Continuous Offence.*—*Former Conviction.*—The offence of keeping a house of ill-fame, as defined by section 1994, R. S. 1881, is a continuing one, and one conviction is a bar to all other prosecutions for the continuous keeping of the same house prior to the returning of the indictment upon which the conviction was had.

From the Knox Circuit Court.

*J. B. Boyle*, for appellant.

*L. T. Michener*, Attorney General, and *O. H. Cobb*, Prosecuting Attorney, for the State.

OLDS, J.—At the March term, 1889, of the Knox Circuit Court, the grand jury returned two indictments against the defendant for keeping a house of ill-fame, resorted to for the purpose of prostitution and lewdness, at said county of Knox and State of Indiana. The indictments were returned on the same day and at the same time, one charging the offence on the 9th day of January, 1889, and the other charging it on the 11th day of February, 1889. The defendant was arraigned and pleaded guilty to the indictment charging the offence on the 11th day of February, 1889, and the court assessed a fine against her of twenty dollars, and

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rendered judgment for the fine and costs. Afterwards she was arraigned on the indictment in this case charging the offence on the 9th day of January, 1889, and she pleaded not guilty, and filed a written answer setting up the former conviction, to which a demurrer was filed by the State, and sustained and exceptions. Trial, resulting in a conviction. Motion for a new trial overruled and exceptions. The rulings of the court in sustaining the demurrer to the defendant's answer, and overruling her motion for new trial, are assigned as errors. All the facts were admitted on the trial, showing the indictments were for the continuous keeping of one and the same house.

The only question presented is as to whether the offence is a continuing one, and whether the one conviction barred the other.

Section 1994, R. S. 1881, provides: "Whoever keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness," etc., shall be fined, etc.

The offence is a continuing one. The time named in the indictment was not material. The one conviction was a bar to the other.

The *State v. Lindley*, 14 Ind. 430, was a prosecution for keeping a gaming house, and it was held that all the time during which it was continuously kept prior and up to the prosecution for the keeping, constituted one indivisible offence, which could be punished but in a single prosecution. And so in this case, the one conviction was a bar to all others for the one continuous keeping of the house prior and up to the returning of the indictment upon which such conviction was had. The doctrine held in the case of *State v. Lindley, supra*, is decisive of the question in this case, and we think it the correct principle. The offence charged is a continuing one. A conviction might have been obtained under either of the indictments by proof of the keeping of the house at any time prior to the finding and returning of the indictment, and not beyond the time fixed by the statute

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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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of limitations. The crime charged is the continuous keeping of the same house ; the same proof was admissible under the one indictment as the other.

Bishop on Criminal Law, vol. 1, section 1052, in the discussion of the rules to determine when the two offences are the same, says: "The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction ; when there could, the second can not be maintained ; when there could not, it can be." When tested by this rule the two offences charged against the defendant are the same.

The court erred in sustaining the demurrer to the defendant's answer of former conviction, and in overruling her motion for a new trial.

Judgment reversed, with instructions to the court below to overrule the demurrer to the defendant's answer.

Filed June 25, 1889.

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No. 12,707.

THE STATE, EX REL. MCCLAMROCK ET AL., v. GREGORY ET AL.

**ADMINISTRATOR'S BOND.**—*Execution of.*—*Signing in Expectation that Others will Sign.*—Where persons, upon being requested by the principal obligor to become co-sureties with other named persons in an administrator's bond, go to the clerk's office and find the bond in the custody of the clerk, already filled out, with the names of the other proposed sureties written in the body thereof, whereupon, without making inquiry or explanation, but expecting the bond to be signed by the other persons, they sign it and leave it with the clerk, who approves it on the same day, without further signatures, the bond is a valid and binding obligation upon the persons who so sign it.

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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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**SAME.**—*Debt Due Estate from Administrator.—Failure to Account for.—Insolvency as Defence to Action on Bond.*—Where a person at the time of his appointment as administrator is indebted to the estate, he should inventory and charge himself with the debt; but if he fails to account for the same, his sureties are not liable, if they show that he was insolvent, beyond the amount that could have been saved to the estate by the exercise of diligence.

**SAME.**—*Failure of Administrator to Make Inventory.*—The failure of an administrator to make an inventory of a claim due from him to the estate is not material to the liability of his sureties, unless actual damage resulted therefrom.

From the Warren Circuit Court.

*J. McCabe* and *E. F. McCabe*, for appellants.

*L. Nebeker*, *H. H. Dochterman* and *C. V. McAdams*, for appellees.

**BERKSHIRE, J.**—This case has been in this court once before, but the opinion throws no light upon the questions now involved. *State, ex rel., v. Gregory*, 88 Ind. 110.

The action is brought upon an administrator's bond, and the complaint is made up of two paragraphs. The first paragraph alleges that one Levin T. Miller was appointed administrator of the estate of Isaac Croy, by the Warren Circuit Court, and that the appellees were the sureties on his bond; that as such administrator the said Miller collected large sums of money belonging to his trust for which he failed to account, but converted the same to his own use.

The second paragraph alleges that before the appointment of the said Miller as administrator he collected a large sum of money as the agent of one Alexander Croy, who had been appointed administrator of the estate left by the decedent in Davis county, Missouri, by the probate court of that county, for which he failed to account, but converted the same to his own use, never having inventoried or charged himself with the same. It is further alleged that there was other indebtedness in the county of Warren, amounting to one thousand dollars, which, as such administrator, the said Miller failed to collect, whereby the estate was dam-

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The State, *ex rel.* McClamrock *et al.*, *v.* Gregory *et al.*

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aged in the sum of one thousand dollars. Whether the conversion took place before or after Miller became administrator does not appear.

The case was put at issue and tried by the court, without the intervention of a jury, and at the request of the parties a special finding was made, and judgment given for the appellees.

The appellees insist that the judgment shall be affirmed ; therefore we are not called upon to decide any questions presented by the cross-errors assigned, except so far as they may be involved in a consideration of the errors assigned by the appellant. *Thomas v. Simmons*, 103 Ind. 538.

The substantial facts stated in the special finding are as follows: Isaac Croy, who in his lifetime was somewhat of a cosmopolite, died in the State of Iowa, intestate, July 26th, 1876. At the time of his death he had property in Missouri, in Iowa, and in Montgomery and Warren counties, Indiana ; on the 8th day of September, 1876, Alexander Croy was, by the probate court of Davis county, Missouri, appointed administrator of the decedent's estate, and after his appointment he made Levin T. Miller, of Warren county, Indiana, his attorney in fact, to collect certain moneys due the decedent from persons living in the said county of Warren, and by virtue of said authority the said Miller collected the sum of fifteen hundred dollars, for which he never accounted to the said administrator, nor to any one else ; that on the 4th day of February, 1878, the said Levin T. Miller was, by the clerk of the said Warren Circuit Court, appointed administrator of the estate of the said decedent, Isaac Croy, and on the 4th day of April, 1878, the Warren Circuit Court confirmed the said appointment ; that on the 1st day of July, 1880, the court removed Miller from his said trust, and the relator became administrator *de bonis non* of the estate ; that during the time Miller was acting in his fiduciary capacity he received, of the assets of said estate, the sum of \$577.70, and paid out the sum of \$588.10 ; that after the

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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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said Miller became administrator he failed to inventory the said fifteen hundred dollars, or any part of it, which he had collected as the agent of the Missouri administrator, and failed to charge himself therewith in any way, notwithstanding he had the same under his control.

At the time of Miller's appointment as administrator he gave the bond in suit, which we will set out: "Know all men, that we, Levin T. Miller, Walter B. Miller, James C. Miller, John Gregory, and Benjamin R. Gregory, are bound unto the State of Indiana in the penal sum of four thousand dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators; sealed and dated this 4th day of February, 1888. The condition of the above obligation is, that the said Levin T. Miller shall faithfully discharge the duties of his trust as administrator of the estate of Isaac Croy, deceased, according to law, then the above obligation to be void, else to remain in full force.

LEVIN T. MILLER.

" J. GREGORY.

" B. R. GREGORY."

After the signatures is the following endorsement on the bond: "Approved by me this 4th day of February, 1878." That before the appellees signed the bond the said Levin T. Miller had requested them to do so, with his two brothers, whose names appear in the body thereof, as his sureties, and they consented so to do, after which, at the instance of the said Levin T. Miller, the clerk of the Warren Circuit Court drew the bond as given above, and afterwards, and on the same day, the appellees went to the clerk's office, examined the bond, and finding the five names in the body thereof, signed it, with the expectation and understanding that it would be signed by the other parties. After the appellees signed the bond they left it on the table in the clerk's office and under the control of the clerk. Walter B. Miller and James C. Miller were financially responsible, but they at no time signed the bond.

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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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The court states as conclusions of law four propositions, but as the third one is wholly immaterial to the questions before us for consideration, we will only refer to the other three of them. These are: 1. That it was the duty of Miller to have inventoried and charged to himself as administrator the amount due from him individually on account of collections as the agent of the administrator in Missouri. 2. That he fully paid over and accounted for all assets that came into his hands after his appointment as administrator. 4. That the appellees did not execute the bond, and the appellant had no right of action thereon as against them.

There are several errors assigned, but it is not necessary that we notice them in detail. In our opinion the court erred in its conclusion that the appellees did not execute the bond.

The facts, briefly stated, are, as we have seen, that the appellees were requested by Levin T. Miller to execute a bond as his sureties jointly with Walter B. and James C. Miller, and consented so to do, and afterwards went to the clerk's office of the Warren Circuit Court, and there found the proposed bond in the custody of the clerk (whose official duty it was to accept and approve the bond) filled out and containing the names of the principal, Levin T. Miller, Walter B. and James C. Miller, together with the names of the appellees, written in the body thereof as obligors, and without any inquiries of the clerk, and making no explanation to him, they executed the bond with the expectation that the Millers would also execute it, and left it with the clerk.

The arrangement as made when the appellees consented to execute the bond was coupled with no condition that their liability thereon was to depend upon the execution of the bond by Walter B. and James C. Miller. The most that can be said as to the arrangement is, that Levin T. Miller requested the appellees to join his brothers in the bond as his sureties, and they consented so to do. From all that appears when the appellees signed the bond and left it with its

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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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proper custodian, they believed and anticipated that Walter B. and James C. Miller would also execute it, but attached no importance thereto as a condition to their liability thereon. This position is supported by the further fact that they learned the next day that the Millers had not signed the bond, and took no steps to have them sign it, or to be released therefrom. But if there had been a full and fair understanding with Levin T. Miller that the appellees were only to become liable in the event that Walter B. and James C. Miller executed the bond, the understanding would have been ineffectual unless made known to the clerk before he approved the bond and issued the letters.

Their only relief after that was to apply to the court to be released from the bond, which they could have done at any time. The case of *Allen v. Marney*, 65 Ind. 398, is a very different case in its facts. There the bond was placed in the hands of the principal obligor and taken to the justice of the peace after two of the sureties named in the body of the bond had signed it, the third person named therein not having signed it. The court in that case holds that the principal, under the circumstances, was the agent of the sureties, and the justice of the obligee in the bond, and that the justice had sufficient notice to put him on inquiry as to whether the principal obligor in the bond was authorized to deliver it; but had the sureties who signed the bond gone before the justice and signed and delivered it to him, not making known that the third person named as surety was to sign it, before its approval by the justice, the court would have had a different case before it.

We are not called upon to decide whether the appellees would be liable or not, if it had been understood that the clerk was not to approve the bond until signed by Walter B. and James C. Miller, and that arrangement made known to him before he acted upon it.

One question which seems to have been overlooked on the trial of the cause was the financial condition of Levin T.



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The State, *ex rel.* McClamrock *et al.*, v. Gregory *et al.*

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Miller, the administrator, during the period of his administration. The money collected by him while professing to act as the agent of the administrator in Missouri, and for which he had not accounted when he became administrator, was a claim in favor of his trust which he should have inventoried and charged himself with; and if, by the use of due diligence, all or any part of the claim could have been saved to the estate, his sureties are therewith chargeable, but if he was hopelessly insolvent they do not become liable therefor, the burden as to the question of insolvency being on the administrator and his sureties. The administrator's failure to make an inventory of the claim is not material as to the liability of his sureties, unless actual damage followed because of the failure.

The finding of the court states that Levin T. Miller, the administrator, had the money which he had collected as the agent of the Missouri administrator under his control when he took out letters of administration. If we are to understand that he had the particular money collected on deposit somewhere, and failed thereafter to account for it, then his sureties would be liable for this failure, but we hardly think the court intended to be thus understood. See 2 R. S. 1876, third clause of section 162, p. 551, which is the statute that was in force when the bond sued upon was executed, and when the administrator was removed from his trust. See *Condit v. Winslow*, 106 Ind. 142; *Miller v. Steele*, 64 Ind. 79.

The debt of the administrator is to be accounted for as other debts or assets, and he may show his insolvency during the period of administration in discharge of his official liability. 2 Woerner Law of Admin., section 311, p. 654; *Griffith v. Chew*, 8 Serg. & R. 17; *Eichelberger v. Morris*, 6 Watts, 42; *Tarbell v. Jewett*, 129 Mass. 457; *McCarty v. Frazer*, 62 Mo. 263.

In some of the States there is a statutory provision making the administrator liable for the amount of his debt as for

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Moore v. Hammons.

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so much cash in his hands, but we have no such provision. See 2 Woerner Law of Admin., section 512, p. 1139; *Baucus v. Barr*, 45 Hun, 582; affirmed, 107 N. Y. 624.

In view of the conclusion to which we have come, and as the judgment must be reversed, we feel that justice can be best subserved by granting a new trial.

The judgment is reversed, and the court below ordered to grant a new trial, and to proceed in accordance with this opinion.

Filed June 27, 1889.

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No. 13,768.

## MOORE v. HAMMONS.

**SUPREME COURT.**—*Assignment of Errors.*—*Attaching to Record.*—An assignment of errors is part of the record although pasted to the transcript. **SEDUCTION.**—*Instruction.*—An instruction that a husband can not recover for the seduction of his wife if she consented to the sexual intercourse is bad.

From the Jay Circuit Court.

*T. Bosworth, O. H. Adair and F. H. Snyder*, for appellant.  
*J. W. Headington, J. J. M. LaFollette and J. F. LaFollette*, for appellee.

**ELLIOTT, C. J.**—The appellee's counsel insist that the assignment of errors is not properly in the record because it is pasted to the transcript. We regard this objection as too technical to prevail. Even before the adoption of the present rules the assignment of errors might be made part of the record by permanently attaching it to the transcript, for we

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 Davis et al. v. Davis.
 

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think that when attached as a page of the transcript the assignment is "entered on the records" within the meaning of the code.

An instruction in an action by a husband for the seduction of his wife which informs the jury that the plaintiff can not recover if the wife consented to the sexual intercourse, is erroneous under any supposable state of the evidence. As the trial court gave such an instruction the judgment must be reversed.

Filed June 26, 1889.

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No. 13,365.

DAVIS ET AL. v. DAVIS.

**PROMISSORY NOTE.—Indemnity.—Loss Essential to Liability.**—A promissory note which is executed merely to indemnify the payee against loss for money advanced for the maker as margins in a joint transaction by the parties in grain, is not enforceable by the payee if no loss occurs.

**SAME.—Transaction in Grain.—Retention by Payee of Maker's Profits.**—Where, in a joint transaction in grain, one party advances for the other the amount of money necessary to make the purchase, and takes the latter's note to indemnify him against loss, it being agreed that in case of a profit the payee shall collect the maker's share and apply it upon the note, the note is not enforceable by the payee if the maker's share of the profits collected and retained by him is equal to the amount due on the note.

**SAME.—Sale of Commodity.—Margins.—Gambling Contract.**—Where it is mutually understood and intended by all the parties to a contract that the commodity said to be sold is neither to be delivered nor paid for, but the contract is to be settled by the seller or purchaser, according as the market shall decline or advance, paying the difference between the contract price and the market price, such contract is a gambling contract and void, and a promissory note executed in the course of such a trans-

119	511
149	145
119	511
165	511

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action to indemnify the payee against loss for money advanced for the maker as margins, is not enforceable by the payee.

**SAME.—Pleading.—Reply.**—In an action by the payee upon a promissory note which the defendant asserts (1) was given to indemnify the plaintiff against loss for money advanced in a transaction in grain, which had resulted profitably, and that the defendant's share of the profits, which the plaintiff had collected and retained, amounted to more than the note, and (2) that the note evidences money advanced by the plaintiff for the defendant in a gambling transaction in grain, a reply that the note was given for money loaned, that the transaction in grain was subsequent to and wholly unconnected with the execution of the note, and that the plaintiff had accounted to the defendant for all profits accruing to him in said transaction, is good.

**SAME.—Settlement.**—A settlement prior to the maturity of a note of all other business matters between the maker and payee, can not make the note enforceable if it is void as being the outgrowth of an illegal gambling contract.

From the Bartholomew Circuit Court.

*M. Hacker, W. T. Strickland and J. B. Reeves*, for appellants.

*W. F. Norton and S. W. Smith*, for appellee.

**COFFEY, J.**—This was an action brought by the appellee in the circuit court against the appellants upon a promissory note. The complaint is in the usual form. The appellant Jacob Davis answered separately in seven paragraphs.

The first paragraph of the answer avers that appellant Jacob Davis is the principal in said note, and that the other appellant is only surety; that, about the time of the execution of the note in suit, the plaintiff and the defendant had a deal in what is known as options or margins with one McKee, and in said transaction plaintiff and defendant agreed to and did purchase together a large quantity of oats, with the understanding and agreement that said plaintiff and this defendant should share equally in the profits and losses of said transaction; that it was required by said McKee that a certain amount of money be advanced by plaintiff and defendant upon said purchase; that this defendant was unable to furnish his part of said money, and it was then agreed between them that plaintiff would advance for the defendant

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*Davis et al. v. Davis.*

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the sum necessary to be put up by him, and take this defendant's note therefor, with Fremont Davis as surety thereon; that, pursuant to said agreement, plaintiff did advance for this defendant said money, with the agreement then made by and between them that said note should be for indemnity and to secure the plaintiff against loss by reason of said transaction, in case said parties suffered loss by reason of decline in said oats purchased as aforesaid, and with the agreement that if there should be no loss then said note should not be enforced or payable, and that said note was executed pursuant to said agreement and understanding; that there was no loss on said transaction, but, on the contrary, when said oats were sold there was a net profit thereon in the sum of \$1,500, this defendant's portion thereof being \$750; that the plaintiff collected the entire sum realized as profits on said oats deal, including the portion due this defendant, and retained, and still retains, the same.

The second paragraph avers that plaintiff and defendant purchased a large quantity of oats of one McKee, to hold the same as a speculation and venture, and to share equally the profits and losses thereon; that it became necessary in order to perfect said purchase and bind the bargain to advance a sum of money on said purchase; that defendant was unable to advance the sum of money required of him, and thereupon the plaintiff advanced the whole sum required; that, to reimburse the plaintiff in case of loss, the defendant executed to him the note in suit for \$300, with his co-defendant as surety thereon; that, in case of a profit on said purchase to such an amount accruing to this defendant as equalled said note, it was agreed that plaintiff should collect the same and apply it to the satisfaction of said note, and to pay the defendant the residue of said profits if any such residue existed; that a net profit of \$1,400 was realized on said purchase; that the plaintiff collected said profits, and retained, and still retains, the same; that the share of de-

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*Davis et al. v. Davis.*

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fendant exceeds the amount due on said note, and that plaintiff has never paid the defendant any part of the same.

The third paragraph of the answer is substantially the same as the first.

The fourth paragraph avers that the note in suit was given without any consideration.

The fifth paragraph is a plea of payment.

The sixth paragraph avers that about the time said note was executed, plaintiff and defendant had a deal in what is known as "options, margins or futures"; that they entered into an agreement to purchase together, in the name of the plaintiff alone, a large quantity of oats, with the understanding and agreement that said plaintiff and defendant should share equally in the profits and losses in said transaction; that, said transaction being carried on in the name of the plaintiff alone, it was required by McKee & Co., with whom plaintiff and defendant were dealing, that plaintiff should advance the sum of six hundred dollars as a margin to protect said deal; that said note was executed to secure the said plaintiff from loss on account of his advancement and payment of defendant's half of said sum; that it was agreed between plaintiff and defendant that in the event no loss should be sustained by the plaintiff in said deal, then the defendant should not pay said note; that it was the rule of said McKee & Co. that in case of loss to parties dealing in options, futures or margins, the loss would never be greater than the amount of margins put up by the parties so dealing, and in case of profit to parties so dealing, the amount of the margins so put up was returned with the amount of the profits; that plaintiff did advance six hundred dollars as the margins on said oats deal; that there was a profit in said deal in the sum of fifteen hundred dollars, seven hundred and fifty dollars of which belonged to the defendant; that the plaintiff collected the whole amount thereof and retained and still retains the same.

The seventh paragraph avers that at the time of the ex-

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*Davis et al. v. Davis.*

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ecution of said note one Mel. McKee, under the name and style of McKee & Co., was operating in Columbus, Indiana, a place or institution commonly called a "bucket-shop," by and through which parties speculated in grain, such as wheat, oats, corn, and other things, such as hogs and lard, on what is commonly called margins, options or futures, by which parties gamed upon the future price of articles, and paid or secured at a future day the difference between the price of the article then and at the date of the contract; that at said time the plaintiff and this defendant were partners in an oats deal with and through the said McKee & Co., the said deal being made in the name of the plaintiff alone, the plaintiff and this defendant to share equally the profits and losses; that by and through the said McKee & Co. the said plaintiff at said time made an option contract for 30,000 bushels of oats for the plaintiff and this defendant; that the purchase-price of said oats was not paid, and it was not intended by any of the parties to said contract that the purchase-price thereof should be paid by the plaintiff and defendant, or either of them; that said oats were never delivered to the plaintiff, or to any one, by his authority, and it was not the intention of any of the parties to said contract that said oats should be delivered; that it was a venture or speculation upon the future price of oats, to be settled by paying or receiving at a future day the difference between the price of oats then and at the date of the contract; that the said McKee & Co. required of the plaintiff the sum of \$600 as a margin to protect the said deal, and the said plaintiff paid the said sum of \$600 as a margin on said deal, and took the note in suit for the defendant's one-half thereof to indemnify him in case of loss; that the said sum of \$300, the consideration of said note, was used by the plaintiff as an advancement of a margin to keep the payment of the difference in the price of oats under said contract secure, and for no other purpose; that said deal in oats, or option contract, was a gambling contract, contrary to public policy, illegal and

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tended that the purchaser should pay for, and the seller should deliver the commodity at the maturity of the contract, it is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin, and increase the same like the purchaser, in order to secure the delivery at maturity, does not vitiate the contract. But if at the time of the contract it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, nor to be delivered, but the contract was to be settled and adjusted by the payment of difference in price—if the price should decline, the purchaser paying the difference; if it should rise, the seller paying the advance, the contract price being the basis upon which to calculate a difference—in such case it would be a gambling contract and void. The same principle is decided in the case of *Sondheim v. Gilbert*, 117 Ind. 71. Indeed, the rule here stated is believed to be universal, and our attention has not been called to any adjudicated case where a contrary doctrine has been announced. Where parties enter into such illegal contracts the courts will leave them where they have placed themselves, and will give them no aid. *Judah v. Trustees, etc.*, 23 Ind. 272; *Root v. Stevenson*, 24 Ind. 115; *Dumont v. Dufore*, 27 Ind. 263.

The fourth paragraph of the reply we think is good. It inferentially, at least, denies the allegations contained in the seventh paragraph of the answer, while it avoids the matters averred in the others.

The seventh and eighth paragraphs of the reply purport to answer the allegations contained in the whole answer. They constitute no sufficient reply to the seventh paragraph of the appellant's answer. We are not able to see how the settlement of all matters of business between the parties, except the note in suit, could give it validity if it was void as being the result and outgrowth of an illegal gaming con-



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*Davis et al. v. Davis.*

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tract. In fact, these paragraphs, while attempting to reply to the whole answer, utterly ignore the seventh paragraph. They are wholly insufficient to avoid the defence therein set out, and the court erred in overruling a demurrer thereto.

The appellants also complain of the action of the court in refusing to require the appellee to answer further interrogatories. The appellants propounded a number of interrogatories to appellee, which had been answered. The court was under no obligation to permit the appellants to file other interrogatories, and require an answer thereto. They should have filed these interrogatories with the others, if they desired them answered.

We do not think the court erred in striking out the second, third, fifth, and sixth paragraphs of the reply. All matters contained therein could have been given in evidence under the general denial, which was pleaded.

Other questions are discussed by counsel in their briefs, but as they may not arise again on another trial of this cause we do not decide them.

Judgment reversed, with instructions to sustain the demurrer to the seventh and eighth paragraphs of the reply, and for further proceedings not inconsistent with this opinion.

Filed June 27, 1889.

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Griffin, Secretary of State, v. The State, *ex rel.* Griffiths, Reporter.

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No. 14,974.

GRIFFIN, SECRETARY OF STATE, v. THE STATE, EX REL.  
GRIFFITHS, REPORTER OF SUPREME COURT.

SUPREME COURT REPORTS.—*Publication and Sale.—Compensation of Reporter.—Act of 1889 Void.*—The act of March 4th, 1889 (Acts of 1889, p. 87), relating to the publication of the Supreme Court Reports and the compensation of the reporter, assumes to create an entire new system, and as that system can not be given effect, according to the legislative intent, in the absence of the provision requiring the judges of the Supreme Court to prepare the *syllabi* of all decisions, which provision has been declared unconstitutional, the whole act is invalid, and the statutes enacted prior to its passage govern.

From the Marion Circuit Court.

*J. L. McMaster* and *A. Boice*, for appellant.

*L. T. Michener*, Attorney General, *V. G. Clifford*, *W. F. Browder*, *S. Claypool*, *W. A. Ketcham* and *A. F. Potts*, for appellee.

ELLIOTT, C. J.—The question which this record presents may be thus stated: Shall the secretary of state accept five hundred copies of volume 117 of the Indiana reports under the laws enacted prior to March 4th, 1889, or must he receive them from the reporter under the act of March 4th, 1889? It is our judgment that the act of March 4th, 1889, is entirely destitute of validity, and that the secretary of state must proceed under the statutes enacted prior to its passage.

It is quite clear that the act of March 4th, 1889, assumes to create an entire new system, and that the essential feature attempted to be introduced by it is in violation of the Constitution and carries down the whole act. Elliott's Supp., sections 1824–1836. It assumes to change the former system by imposing upon the judges of the Supreme Court the duty of preparing the *syllabi*, and this is the keystone of the

119	590
120	579
121	521
123	375

119	590
126	310
119	520
137	565

119	520
145	486

119	520
162	171

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Griffin, Secretary of State, v. The State, *ex rel.* Griffiths, Reporter.

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entire system it proposes to create. The removal of this keystone, like the removal of the keystone of an arch, causes the whole to crumble and fall. It is impossible to enforce the act without judicial legislation, since reports without *syllabi* are unknown to the law, and it can not be rationally conceived that the Legislature intended to provide for a system of reporting with this essential and indispensable feature absent. The error of the Legislature consists in assuming that the duty of preparing the head-notes can be imposed upon the judges. *Ex Parte Griffiths*, 118 Ind. 83. This error pervades and poisons the whole act and causes its entire invalidity. We think it is beyond controversy that a system resting on a radical and fundamental error must fail.

The provision of the act assuming to compel the judges to prepare the *syllabi* is so interlocked and blended with the other provisions as to make a separation impossible. We understand it to be firmly established that where a separation can not be made, and the invalid provision completely detached and treated as independent, the whole act must be pronounced void. If the purpose of an act "is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley Const. Lim. 213. In *Meshmeier v. State*, 11 Ind. 482, WORDEN, J., in delivering the opinion of the court, said: "But it would seem that the provisions of the statute held to be constitutional, should be substantially the same, when considered by themselves, as when taken in connection with other parts of the statute

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Griffin, Secretary of State, v. The State, *ex rel.* Griffiths, Reporter.

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held to be unconstitutional; or, in other words, where that part of a statute which is unconstitutional, so limits and qualifies the remaining portion, that the latter, when stripped of such unconstitutional provisions, is essentially different, in its effect and operation, from what it would be were the whole law valid, it would seem that the whole law shall fall. The remaining portion of the statute, when thus stripped of its limitations and qualifications, can not have the force of law, because it is not an expression of the legislative will. The Legislature pass an entire statute, on the supposition, of course, that it is all valid, and to take effect. The courts find some of its essential elements in conflict with the Constitution, strip it of those elements, and leave the remaining portion mutilated and transformed into a different thing from what it was when it left the hands of the Legislature. The statute thus emasculated, is not the creature of the Legislature; and it would be an act of legislation on the part of the courts, to put it in force. The courts have no right thus to usurp the province of the Legislature." The general rule stated by Judge Cooley is approved and applied in *State, ex rel., v. Denny*, 118 Ind. 449.

It is undoubtedly the law that when the several provisions of an act are independent, some may stand although others may fall, but this occurs only when the provisions are clearly independent. As said by SHAW, C. J., in *Warren v. Mayor, etc.*, 2 Gray, 84, the rule that some portions of a statute may stand while others fall, "must be taken with this limitation, that the parts, so held respectively constitutional and unconstitutional, must be wholly independent of each other."

In the statute under discussion the invalid provisions are not independent, and if the unconstitutional provisions are stripped from it, then it becomes an entirely different act from the one which left the hands of the Legislature. The first section of the act provides that "It shall be the duty of the reporter of the Supreme Court to receive all opinions and *syllabi* of opinions of the Supreme Court, which by

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Griffin, Secretary of State, v. The State, *ex rel.* Griffiths, Reporter.

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this act are required to be published" (Acts 1889, p. 87), and section twelve directs the judges to prepare the *syllabi*. It is, therefore, quite clear that if the provisions of section twelve are inoperative, there can be no *syllabi* prepared, and without *syllabi* it would, as every one knows, be impossible to prepare an index, and yet the act commands that an index shall be prepared by the reporter, and that the *syllabi* which the reporter shall receive are those ordered to be prepared by the judges. The sections referring to the index are thus inseparably interwoven with the provisions respecting the preparation of the *syllabi*, and the fall of the latter necessarily carries the former. Without *syllabi* we should have reports utterly unlike any ever published, and surely this was not the legislative intention. Certainly it can not be contended that the Legislature intended to create a system providing for the publication of a mere collection of decisions without indexes or head-notes, and yet, if we strip the act of the provisions relating to the *syllabi*, we should have just such a system. The result we have indicated must inevitably follow if the provisions respecting the *syllabi* are eradicated, for without them there is no provision authorizing any person to prepare the *syllabi*. It is, therefore, plainly evident that the whole system which the act assumes to create depends entirely upon the provisions respecting the *syllabi*. Either the whole system fails, or a system built up out of the mutilated act must be one wherein reports are to be published without *syllabi* or indexes. But such a deformed and lame system courts have no right to construct, for, not only is the work of building a system legislative, but the attempt by the courts to build one would be to overthrow the expressed legislative will, since it is perfectly clear that the Legislature meant to construct a complete system upon the foundation laid by it. As that foundation is absolutely destitute of strength, the whole fabric must fall.

We suppose no one doubts that the head-notes are an essential part of a report, and this being so, it must follow that

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Griffin, Secretary of State, *v.* The State, *ex rel.* Griffiths, Reporter.

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an act which attempts to impose this work on the judges proceeds on a theory that is utterly untenable, and upon which no valid act can be constructed. The act before us proceeds on this theory, and is entirely devoid of force. The theory being radically unsound, it is impossible to detach any portion of the provisions of the act, for the radical defect in the governing theory destroys the whole superstructure.

Courts can not patch up legislative enactments. A court has no right to enter the legislative domain. It would be an unjustifiable usurpation of power by the courts to attempt to cure the infirmity in the statute by placing in it provisions found in other acts. The act before us assumes to cover the entire subject—it is an entirety, and as an entirety must be judged—and as it assumes to cover the entire subject it does it or it does nothing. It must stand or fall as an entire system. The courts must take the act as it comes from the Legislature, and they can neither import provisions into it nor wrench provisions from it by assuming the functions of legislators. Legislation can not be mended by judicial tinkering, nor validated by judicial judgment where it is so infirm as to be without force.

With questions of policy or expediency courts have nothing to do, nor can the good policy and wise expediency of an act of the Legislature control the judicial judgment. If an act impinges upon the Constitution, one course, and one course only, is open to the courts, and that is to adjudge it void. However much the courts may be impressed with the wisdom of a particular act, or however urgent may seem the necessity for legislation, they must, nevertheless, try the act by the Constitution, and if it will not stand the test, so declare.

Judgment affirmed.

Filed June 27, 1889.

Bruce *et al.* v. Bissell *et al.*

No. 14,907.

## BRUCE ET AL. v. BISSELL ET AL.

**DESCENT.**—*Degrees of Kindred.*—*How Computed.*—Degrees of kindred are computed in this State according to the rules of the civil law, and the statute of descents covers every conceivable state of circumstances that can surround the descent of property.

**SAME.**—*Next of Kin.*—*Great-Grandmother.*—Under section 2471, R. S. 1881, the real estate of an intestate descends to a great-grandmother, as being "the next of kin in equal degree of consanguinity," in preference to a great-aunt or uncle of the same maternal or paternal line.

**SAME.**—*Will.*—*Construction of.*—*Vested Remainder.*—A testator devised land to his daughter for life, with remainder over in fee to her child or children, in case she should survive him, leaving a child or children. By a subsequent clause of the will the testator devised to his widow a life-estate in the same land, and after her death to his right heirs in fee. The daughter survived the testator, but died soon after, leaving a son, who also died, leaving a son. The latter died unmarried and without issue, leaving the testator's widow, his great grandmother, as his next of kin.

**Held,** that the daughter's son took a vested remainder in fee, which was in nowise affected or cut down by the doubtful expressions contained in the subsequent clause of the will, and that it passed to the testator's widow upon the death of her great-grandson.

From the Marion Circuit Court.

*R. W. McNeal*, for appellants.

*J. E. McDonald, J. M. Butler, A. H. Snow, F. Winter, J. B. Elam, J. S. Duncan, C. W. Smith, W. L. Taylor, A. B. Young, F. W. Morrison, S. M. Shepard, C. Martindale, C. E. Barrett, B. F. Davis* and *W. H. Martz*, for appellees.

**MITCHELL, J.**—This action was brought by James A. and John W. Bruce against George P. Bissell and about one hundred others, to recover the possession of certain real estate lying within the limits of the city of Indianapolis. The plaintiffs claimed title under the last will and testament of William Reagan, who died on the 5th day of April, 1847,

119	525
122	138
119	525
120	64
119	525
131	208
133	394
119	525
138	509
119	525
143	260
119	525
144	575
146	229
119	525
153	496
119	525
159	116
119	525
165	203
119	525
171	384

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*Bruce et al. v. Bissell et al.*

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the owner of the land in controversy, while the defendants in like manner assert title as purchasers through one whom they claim took it as devisee from the testator. The judgment from which this appeal is prosecuted was adverse to the plaintiffs below, and whether that judgment shall be affirmed or reversed depends upon the construction to be given to the will under or through which both parties claim. So much thereof as is material reads as follows:

“I give and bequeath unto my daughter, Rachel Johnson, wife of Jeremiah Johnson, a tract of land on which she now lives, lying and being in Marion county, known as the south half of the southeast quarter of section number twenty-five, in township number sixteen north, of range three east, for and during her natural life, provided she shall be living at the time of my death, and after her death to the child or children of her body lawfully begotten who may survive her, in fee simple. But if she, said Rachel, should die before me and leave such child or children living at my death, then, in that event, I bequeath said land to said child or children in fee simple. But should she, said Rachel, be living at the time of my death, and afterwards die leaving no such child or children, then I give and bequeath said tract of land to said Rachel for life. Remainder to my right heirs in fee simple.

“I give and bequeath to my daughter, Dovey Bruce, wife of George Bruce, the north half of the aforesaid tract of land for and during her natural life, provided she shall be living at the time of my death, and after her death to the child or children of her body lawfully begotten who may survive her, in fee simple. But if the said Dovey should die before me and leave such child or children living at my death, then and in that event I bequeath said tract of land to said child or children in fee simple. But should the said Dovey be living at the time of my death, and afterwards die leaving no such child or children, then I give and bequeath



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Bruce *et al.* v. Bissell *et al.*

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said tract of land to said Dovey for life. Remainder to my right heirs in fee simple.

“It being my express intention that my said daughters shall respectively enjoy said tracts of land above described and bequeathed, during their respective natural lives, and after their and each of their deaths to descend in fee simple respectively to the child or children of their bodies lawfully begotten that may survive them respectively and survive myself, and in default then to go to my right heirs in fee simple.

“I give and bequeath to my beloved wife, Nancy, during her natural life, the farm on which I now live, known as the southeast quarter of section number twenty-five, in township number sixteen (16) north, of range three east, and after her death to my right heirs in fee simple, except the said Rachel Johnson and Dovey Bruce and their descendants.”

The facts are obscurely or incompletely stated in the record and briefs, but, as we understand the record, the land involved in the present litigation is that described in the first paragraph above, and was devised to Rachel Johnson for life, with remainder over to her children. The same land is embraced by the description contained in the last clause of the will, and is devised to the testator's widow for life, together with the north half of the same tract, which is disposed of by the second clause above set out.

The widow and both daughters survived the testator, Rachel having at the time of his death one son, Harrison L. Johnson, who was her only child. She survived her father only nineteen days, her death having occurred on the 24th day of April, 1847. Harrison L. Johnson died intestate on the 15th day of September, 1856, leaving John W. Johnson as his sole heir. The latter died on the 27th day of December, 1872, unmarried and without issue, leaving Nancy Reagan, his great-grandmother, as his next of kin under the statute.

Nancy Reagan, assuming that she took a life-estate in the

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Bruce *et al.* v. Bissell *et al.*

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whole farm under the last clause of the will of her husband, continued in possession, and in 1873, claiming to have inherited the south half in fee from her great-grandson, John W. Johnson, she sold and conveyed it to George Bruce. The land was afterwards platted into streets, alleys and lots. The defendants claim through the conveyance to George Bruce, as his near and remote grantees, while the plaintiffs, the only children and heirs of Dovey Bruce, assert that by the terms of the will of William Reagan they are the owners and entitled to the immediate possession, as the right heirs of the testator, to whom the land was devised upon a contingency which they claim has happened.

It was settled by the judgment of this court in *Cloud v. Bruce*, 61 Ind. 171, that degrees of kindred are computed in this State according to the rules of the civil law, that the statute of descents covers every conceivable state of circumstances that can surround the descent of property, and that, under section 2471, R. S. 1881, the real estate of an intestate descends to a great-grandmother, as being "the next of kin in equal degree of consanguinity," in preference to a great-aunt or uncle of the same paternal or maternal line. It is hence settled by the above decision, that whatever interest John W. Johnson, the grandson of Rachel Johnson, had in the land at the date of his death, was inherited by his great-grandmother, Nancy Reagan, through whose conveyance the appellees claim title.

On the appellants' behalf it is contended that the intention of the testator, as expressed in his will, was, that his widow, Nancy Reagan, should enjoy the entire estate during her natural life, and that upon her death it should vest in equal moieties in his two daughters, Rachel Johnson and Dovey Bruce, as provided in the first and second clauses of the will, to be enjoyed by them during their respective lives, and upon the death of the daughters respectively, with a child or children surviving, the fee simple was then to vest in their child or children respectively, and in the event of

the death of either, leaving no child or children, then the share so devised was to go to the right heirs of the testator. Hence, the argument proceeds, since Nancy Reagan, in whom was vested the paramount life-estate, outlived her daughter Rachel Johnson, and all her lineal descendants, neither the daughter nor her son, Harrison L., both of whom were alive at the death of the testator, ever took any vested interest in the land, which, according to the appellants' insistence, was carried by the last clause of the will, upon the termination of the precedent particular estate, by the death of Nancy Reagan, to them as the right heirs of the testator.

The error which pervades the argument is fundamental, and lies in the assumption that because the enjoyment of the successive estates was postponed until the particular estate which preceded it should determine, therefore the successive estates created by the will did not vest in the respective devisees upon the death of the testator, but continued in abeyance until the happening of the events which were to determine the prior estate.

The general rule is, where a particular estate is created by will, with a remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the enjoyment of the prior estate determines, and not as designed, in the absence of express words, or a manifest intent to that effect, to postpone the vesting of the remainder over. 2 Jarman Wills, 407. So where a remainder is limited over to a class, which is liable to be increased during the continuance of the prior estate, the remainder will not be held in abeyance, but will vest at the testator's death in those of the class who answer the description, subject to open and let in after-born members. Tiedeman Real Prop., section 402.

It is familiar law that, in the absence of a clear manifestation of the intention of the testator to the contrary, estates shall be held to vest at the earliest possible period. The in-

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tent to postpone the vesting of the estate must be clear and manifest, and must not arise by mere inference or construction. It is likewise well settled that "The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested." *Doe v. Considine*, 6 Wall. 458, 475; *Amos v. Amos*, 117 Ind. 19; *Amos v. Amos*, 117 Ind. 37; *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498, and cases cited. "An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate, if the possession were to become vacant, and the certainty that the event, upon which the vacancy depends, must happen sometime, and not the certainty that it will happen in the lifetime of the remainderman, determines whether or not the estate is vested or contingent." *Hoover v. Hoover*, *supra*; *Croxall v. Shererd*, 5 Wall. 268; Tied. Real Prop., section 401.

When the testator whose will is involved in the present case died, his widow, Nancy Reagan, his daughter, Rachel Johnson, and her son, Harrison L. Johnson, to whom he had devised particular and ulterior estates respectively in the land in controversy, were all alive. A will takes effect at, and is to be regarded as speaking from, the date of the death of the testator, and words of survivorship found therein, unless there is a manifest intent to the contrary, always relate to those who are then in being and survive the testator. By the first clause of the will the land in dispute was devised to Rachel Johnson for life, provided she should be living at the time of the testator's death, and after her death to her child or children who might survive her. It was provided further, that in the event the testator's daughter Rachel should be living at his death, and yet die without leaving a child or children, then she was to have the land during her lifetime, with remainder over to his right heirs in fee simple. This was an attempt to create an estate in the nature

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of a cross-remainder ; but, as we have seen, Rachel Johnson died subsequent to the death of the testator, leaving a son, Harrison L. Johnson, in whom the remainder in fee vested upon the death of the testator. The contingency never arose upon which the cross-remainder was to take effect. It is unnecessary, therefore, to consider that feature of the will further.

It may be observed that the last clause of the will gave to the widow, Nancy Reagan, an estate for life in the entire tract, in clear and unambiguous terms. This clause also contains some expressions in relation to the remainder over after her death, which, when considered in connection with the preceding clauses in the will, are ambiguous. The land in dispute was, however, disposed of in clear and unambiguous terms in the second clause of the will. It was devised to Rachel Johnson for life, with remainder over in fee to her child or children, in case she should survive the testator, leaving a child or children, which she did. But for the last clause of the will there would be no room to argue that Harrison L. Johnson did not take the remainder over in fee under this clause of the will ; whatever doubt there is arises from the ambiguity created by the latter part of that clause. The rule is that where an estate or interest is given in one clause of a will, in clear and decisive terms, the interest so given can not be taken away or cut down by raising a doubt upon the extent and meaning of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate. *Bailey v. Sanger*, 108 Ind. 264, and cases cited ; *Hochstedler v. Hochstedler*, 108 Ind. 506 ; *Goudie v. Johnston*, 109 Ind. 427 ; *Allen v. Craft*, 109 Ind. 476.

Where two particular estates of the same extent are carved out of the same premises and given to different persons, in the absence of anything to indicate an intention on the part of the testator that the devisees are to be joint beneficiaries,

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the rule seems to be that the superior estate must elapse before the inferior can begin. In the absence of other evidence as to which is superior, that which is created last in the will is deemed to have the preference. O'Hara Wills, 39, 302.

It is not important, however, that we determine whether Nancy Reagan took the superior life-estate in the whole tract, or whether she became a joint beneficiary for life with her daughters. Since the decision depends entirely on the conclusion already enunciated, that Harrison L. Johnson took a vested remainder in fee, upon the death of the testator, which was in nowise affected or cut down by the doubtful expressions contained in the last clause of the will, there was no error.

The judgment is, therefore, affirmed, with costs.

Filed June 27, 1889.

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No. 13,847.

OWENS v. FRAGER.

**APPRENTICE.—Poor Child.—Power of Superintendent of County Asylum.—Consent of Judge.**—Under sections 6092 and 5337, R. S. 1881, construed together, an indenture made by the superintendent of a county asylum apprenticing a child is invalid unless approved by the judge of the court having probate jurisdiction.

**SAME.—Annulment of Indenture.—Right of Mother to Sue.—Prima facie,** the right of action to set aside an indenture of apprenticeship made by the overseers of the poor is in the father of the child, and an action is not well brought by the mother unless she avers facts showing that she is entitled to sue.

From the Benton Circuit Court.

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Owens v. Frager.

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*D. Fraser*, for appellant.

*M. H. Walker* and *G. H. Gray*, for appellee.

BERKSHIRE, J.—This was an action to annul and set aside an indenture of apprenticeship executed by the superintendent of the county asylum within and for the county of Benton and State of Indiana, and to obtain the custody of a child.

The court sustained a demurrer to the complaint, and the appellant, who was the plaintiff below, failing and refusing to amend her complaint, the court rendered judgment against her for want of a sufficient complaint.

Section 6092, R. S. 1881, is the authority for the superintendent of a county asylum to apprentice or bind out a child. This section is general in its character, and does not provide the mode of procedure necessary to carry out the authority given. This is found in the act specially providing for the creation of the relation of master and apprentice, and providing what shall be the duties and obligations of each. This act contains numerous sections, beginning with section 5334, R. S. 1881.

Section 5336 provides under what circumstances the overseers of the poor may bind children under sixteen years of age. The first specification of this section provides that the child of a pauper, supported in whole or in part by the county, and the second specification provides that any child whose parents have abandoned, neglected, or are unable to support it, may be bound by the overseers of the poor.

Section 5337 provides that the assent of the judge of the court having probate jurisdiction shall be necessary to the validity of an indenture of apprenticeship under the foregoing specifications.

• Construing these statutes together, and this must be done to give force and effect to section 6092, *supra*, an indenture made by the superintendent of a county asylum is of no

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Owens v. Frager.

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validity until the judge gives his assent, as provided in section 5337, *supra*.

The averments in the complaint show that the judge's assent was not given, therefore it appears that the indenture in question is invalid. But the complaint is bad because it is not shown from the averments therein that the cause of action alleged is in the appellant. *Prima facie*, a right of action of the character of the one alleged in the complaint before us is in the father of the child, and not in the mother. We can not presume that the father is dead, or, if living, that notwithstanding that fact the mother is entitled to maintain the action.

We think the complaint states a cause of action, but because it fails to show that the right of action is in the appellant, the court properly sustained the demurrer. *Brooke v. Logan*, 112 Ind. 183, and cases cited; *Kerwin v. Wright*, 59 Ind. 369; section 2518, R. S. 1881; *State, ex rel., v. Banks*, 25 Ind. 495; *Henson v. Walts*, 40 Ind. 170; *Kerwin v. Myers*, 71 Ind. 359.

This action is properly brought for the purpose of determining the validity of the indenture binding the child, and incidentally, and as a question necessarily connected therewith, the parties' rights as to the custody of the child may be determined.

Judgment affirmed, with costs.

Filed June 28, 1889.



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Sparklin *et al.* v. The Wardens and Vestrymen of St. James' Church.

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No. 13,796.

SPARKLIN ET AL. v. THE WARDENS AND VESTRYMEN OF  
ST. JAMES' CHURCH.

SUPREME COURT.—*Brief.*—*Waiver of Errors.*—Alleged errors, which are not discussed in the brief of counsel, are waived.

SAME.—*Assignment of Error.*—A joint assignment of error by several appellants presents no question as to a ruling affecting only one of them.

From the Elkhart Circuit Court.

*L. Wanner, W. H. Vesey, C. W. Miller, H. C. Dodge, R. M. Johnson and E. G. Herr*, for appellants.

*W. L. Stonex, E. E. Mummert and J. H. Baker*, for appellees.

OLDS, J.—This is an action brought by the appellees against Charles C. Sparklin, Anna L. Sparklin, Henry Kolb and William Gross, for the possession of and to quiet title to certain real estate described in the complaint. Issue was joined and there was a trial resulting in a judgment in favor of the appellees, and Sparklin and Sparklin appeal to this court.

The appellants jointly assign as error: *First.* The overruling of the demurrer to the complaint, and *Second.* Error in sustaining the demurrer to the answer of Anna L. Sparklin.

The first alleged error is not discussed by counsel in their brief, and is, therefore, waived. There is not a proper assignment of the second alleged error.

The defendant Anna L. Sparklin filed a separate answer to the complaint, to which there was a demurrer filed and sustained, and both of the appellants join in the assignment of error that the court erred in sustaining the demurrer to said separate answer of Anna L.

It has been repeatedly held by this court that a joint as-

119	535
123	209
119	535
126	338
119	535
124	240
126	323
119	535
143	437
119	535
127	234
119	535
154	181
155	61

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Cargar v. Fee.

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signment of error by several appellants presents no question as to a ruling against one of the appellants, and which constitutes error against one only. *Orton v. Tilden*, 110 Ind. 131; *Hinkle v. Shelley*, 100 Ind. 88; *Robbins v. Magee*, 96 Ind. 174; *Boyd v. Pfeifer*, 95 Ind. 599; *Williams v. Riley*, 88 Ind. 290; *Feeney v. Mazelin*, 87 Ind. 226; *Eichbrecht v. Angerman*, 80 Ind. 208.

There is no question presented for the decision of this court.

Judgment affirmed, with costs.

Filed June 28, 1889.

119 536  
120 185  
121 166

119 536  
130 21

119 536  
140 573

119 536  
145 180

119 536  
154 156

No. 13,767.

## CARGAR v. FEE.

**JUDGE PRO TEMPORE.**—*Power to Appoint Successor.*—A judge *pro tempore*, whose competency is objected to by a party, has no power to appoint another person to serve as judge *pro tempore*, that power resting solely in the regular judge.

**SAME.**—*Validity of Appointment.*—*Objection to.*—Where the authority of a *de facto* judge, acting under color of a temporary appointment, is promptly challenged and in a proper method, the question of the validity of his appointment is presented.

From the Adams Circuit Court.

*T. G. Smith, D. D. Heller and P. G. Hooper*, for appellant.

*J. S. Dailey, L. Mock, A. Simmons and J. T. France*, for appellee.

**ELLIOTT, C. J.**—The judge of the Wells Circuit Court entered of record the appointment of James P. Hale, Esq., as judge *pro tempore*, and Mr. Hale accepted the appoint-

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ment and qualified. The appellant, by affidavit, objected to the competency of Mr. Hale, whereupon he appointed Edwin C. Vaughan judge *pro tempore*, and Mr. Vaughan duly qualified. As soon as Mr. Vaughan had qualified, the appellant objected to his trying the cause, and in support of his objection asserted that the appointment was unauthorized, and that Mr. Vaughan was incompetent because he held the office of prosecuting attorney of the judicial circuit.

The question which first arises is this: Had Mr. Hale power to appoint Mr. Vaughan?

The question we have stated is properly before us and must be decided, for the objection was promptly interposed. An appointment of a judge *pro tempore*, although not regularly made, constitutes the appointee a judge *de facto*, and the acts of a judge *de facto* can not be overthrown in a collateral attack, nor, indeed, in a direct attack, unless the objection is promptly made. *Smurr v. State*, 105 Ind. 125; *Schlunger v. State*, 113 Ind. 295; *Bartley v. Phillips*, 114 Ind. 189, and cases cited; *Greenwood v. State*, 116 Ind. 485; *Littleton v. Smith*, *ante*, p. 230. Where, however, the authority of a *de facto* judge, acting under color of a temporary appointment, is promptly challenged and in a proper method, the question of the validity of his appointment is presented.

Many well reasoned cases deny the authority of a judge to appoint a judge *pro tempore*, even though a statute assumes to confer the authority, but our decisions declare a different doctrine, and the validity of our statute conferring authority upon a judge to make such an appointment must be regarded as too firmly established to be questioned. *Feaster v. Woodfill*, 23 Ind. 493; *Brown v. Buzan*, 24 Ind. 194; *State v. Dufour*, 63 Ind. 567; *Pate v. Tait*, 72 Ind. 450; *Fassinow v. State*, 89 Ind. 235; *Board, etc., v. Seaton*, 90 Ind. 158; *Wood v. Franklin*, 97 Ind. 117; *Board, etc., v. Courtney*, 105 Ind. 311. But the case before us presents a question not decided in any of the cases to which we have referred, for here the question is not as to the power of the duly elected

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judge to appoint, but as to the power of his appointee to appoint a judge *pro tempore*.

Our judgment is that the appointment of Mr. Vaughan was unauthorized. A person who acts as judge *pro tempore* in a particular case has not the authority of the regular judge, and, therefore, has no appointing power. The extent of his authority is to hear and determine the case which he was appointed to try, but he can not appoint another person to serve as judge. The general rule is, that judicial power can not be delegated, and this rule is too firmly settled to be departed from, except in cases where a valid law expressly authorizes the delegation of such authority. *State, ex rel., v. Noble*, 118 Ind. 350. The statute authorizing the duly elected judge to appoint a judge *pro tempore* trenches upon the fundamental principle, and by many of the decisions would be condemned. Cooley Const. Lim. (5th ed.) 306, *n.* We can not further encroach upon this elementary principle by adjudging that a judge, holding by a temporary appointment, may himself appoint a person to discharge the duties of the office.

When Mr. Hale declined to act, and laid aside the power conferred upon him by the duly chosen judge, the authority to appoint re-vested in that judge and could not be rightfully exercised by an appointee. *State v. Millsops*, 39 La. Ann. 793.

Judgment reversed.

Filed June 28, 1889.

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Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Wynant.

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No. 13,366.

119	539
165	129
119	539
167	340

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIAN-  
APOLIS RAILROAD COMPANY v. WYNANT.

**RAILROAD.**—*Leaving Cars in Highway.*—*Frightened Horses.*—*Liability for Injury Caused by.*—*Complaint.*—A complaint against a railroad company for damages caused by the plaintiff's horses taking fright at cars alleged to have been "unlawfully, carelessly and negligently placed upon a public highway," is not bad on demurrer for failing to allege that the cars were permitted to remain upon the highway an unreasonable time.

**PLEADING.**—*Uncertainty.*—*Motion to Make Specific.*—*Demurrer.*—Mere uncertainty in the allegations of a pleading is a defect which can not be reached by demurrer, the remedy being by a motion to make more specific.

From the Madison Circuit Court.

*H. H. Poppleton, M. S. Robinson, J. W. Lovett and A. C. Harris,* for appellant.

*H. D. Thompson,* for appellee.

**COFFEY, J.**—The substantial averments in the complaint in this cause are, that the appellant is a corporation, formed under the laws of the State of Indiana; that on the 22d day of March, 1882, it unlawfully, negligently and carelessly placed one of its box-cars upon and partially across a public highway leading from the city of Anderson to the town of Pendleton, both in said county of Madison, and by means thereof caused a team of two horses, then attached to a two-horse wagon, in which wagon he was then riding, and which team of horses he was then driving, to become frightened and run away, overturning, in their fright, the spring-wagon in which he was riding and throwing him and his wife, who was riding therein with him, out of said wagon and breaking the arm of his said wife, and otherwise greatly bruising and injuring her, rendering her unable to perform any labor, and even to feed herself, and thus depriving him of her

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Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Wynant.

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reasonable labor and services, to his damage two hundred dollars; and also causing him to board, nurse and take care of her since said accident, to his damage two hundred dollars; and also causing him to pay for medical services for his said wife, seventy-five dollars; also causing said horses to be damaged in the sum of twenty-five dollars, etc.; that said accident occurred and was caused wholly by the unlawful acts and by the negligence and carelessness of the appellant, and that neither he, the appellee, nor his wife contributed thereto.

A demurrer to this complaint was overruled, and the appellant excepted. The appellant then answered by a general denial, and the cause, being at issue, was tried by the court. A finding and judgment, over a motion for a new trial, were entered in favor of the appellee.

The errors assigned in this court are that the circuit court erred: 1st. In overruling the appellant's demurrer to the appellee's complaint. 2d. In overruling appellant's motion for a new trial.

It is earnestly insisted that the complaint is bad because it does not aver that the car was permitted to remain on the highway an unreasonable time, and that therefore it may have been placed there only a moment before the accident, or, for aught that appears, it may have been attached to a train.

We do not think this position is tenable. It is averred that the appellant unlawfully, carelessly and negligently placed the car on the public highway. If it had placed it there in the ordinary transaction of the business of the appellant, and had not permitted it to remain an unreasonable time, it was not there unlawfully, as averred in the complaint. It is true that the complaint is vague and uncertain in its allegations, but such defect can not be reached by a demurrer; the remedy is by a motion to make the allegations more specific. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Hawley*

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Cleveland, Columbus, Cincinnati and Indianapolis R. R. Co. v. Wynant.

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v. *Williams*, 90 Ind. 160 ; *Pennsylvania Co. v. Dean*, 92 Ind. 459.

This complaint does not differ materially from the first paragraph of the complaint in the case of *Cleveland, etc., R. R. Co. v. Wynant*, 100 Ind. 160. We think the complaint states a good cause of action. *Pittsburgh, etc., R. R. Co. v. Kitley*, 118 Ind. 152.

The only question argued on the second assignment of error is that the evidence does not support the finding of the circuit court. It is insisted that there is no evidence tending to show that the appellant, or its employees, placed the car on the public highway.

The accident occurred on a side-track constructed from the main line of appellant's road to a gravel pit. The side-track had been used for some length of time to stow away empty cars not in use by the appellant. The evidence tended to prove that this side-track was full of cars from the gravel pit up to the highway ; the cars extended into the highway from six to eight feet. They had been in this condition two or three weeks. Another car on the opposite side of the highway extended into the highway some distance, leaving a space of between fifteen and twenty feet between the cars, through which persons travelling on the highway were compelled to pass. This had been the condition for two or three days. We think that from all the facts and circumstances detailed by the witnesses the court might well have inferred that the employees of the appellant left the cars in the condition in which they were found when the accident in question occurred.

It is also objected that there is no evidence that the appellee's team became frightened at the cars. In this counsel for appellant are mistaken. In answer to a question propounded to him by his counsel, the appellee expressly stated that his team became frightened at the cars. The weight of his testimony was for the circuit court. We can

The Louisville and Nashville Railroad Company v. Crunk.

not disturb the finding of the court below upon the weight of the evidence.

We find no error in the record for which the judgment of the court below should be reversed.

Judgment affirmed.

Filed April 6, 1889; petition for a rehearing overruled June 28, 1889.

119	549
120	471
123	419
119	549
127	150
119	542
143	141

No. 13,337.

119	542
171	402

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY  
v. CRUNK.

RAILROAD.—*Personal Injury.—Complaint.—Motion to Make Specific.*—Where a complaint against a railroad company to recover for personal injuries alleges that the injuries were caused by the defendant suddenly and greatly increasing the speed of its train while the plaintiff was in the act of stepping off at a depot platform, it is not error to overrule a motion to make the complaint more specific by stating what agent or employee, and what acts of such agent or employee, caused the sudden increase of speed.

SAME.—*Alighting from Moving Train.—Negligence.*—There is no conclusive legal presumption that one who voluntarily alights from a moving train is guilty of such negligence as will defeat an action for injuries, but the question as to whether the act constitutes negligence is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place, and all the circumstances connected with the act of alighting.

SAME.—*Sick Passenger.—Carrying into Train.—Obligation of Company to Assistants.—Opportunity to Alight.*—Where a passenger is so sick and enfeebled as to make it necessary for assistants to carry him from the station to a seat in the train upon which he has secured passage, the railroad company, having contracted to carry him with knowledge of his condition, is bound to allow him the required assistants, and is under an obligation to stop the train long enough to afford the persons aiding



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such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers.

**SAME.**—*Sudden Increase of Speed.—Injury to Person Alighting.*—Where one enters a train at a station to assist in carrying into a car a sick passenger whom the railroad company has contracted to carry, and while in the car the train is started before he has had a reasonable time to get off, yet at a rate of speed so slow as to enable him to alight in safety, but after he has reached the platform of the car and is in the act of alighting the speed is so suddenly and greatly increased, through the negligence of the trainmen, as to throw him off and injure him, the company is liable.

**VERDICT.**—*Answers to Interrogatories.—Judgment Upon.*—It is only where there is a direct conflict between the general verdict and the facts found by the jury in their answers to interrogatories that a motion for judgment on the answers, notwithstanding the general verdict, will be sustained.

From the Vanderburgh Circuit Court.

*S. B. Vance, J. M. Shackelford and W. J. Wood, for appellant.*

*A. P. Hovey, G. V. Menzies and W. Loudon, for appellee.*

**OLDS, J.**—This is an action by the appellee against the appellant for damages resulting from injuries to the appellee by reason of the negligence of appellant's employees in failing to stop a passenger train at a railway station a sufficient length of time to allow appellee to get off in safety, and in suddenly accelerating the speed of the train when appellee was in the act of stepping off.

As some question is made as to the negligence charged in the complaint, we state the principal averments, which are as follows: That the defendant, before and at the time of the grievances complained of, was, and now is, the owner of a railroad known as the Louisville and Nashville Railroad, running from the city of Evansville, Indiana, by and through the city of Mt. Vernon, Indiana, and other cities and towns, to the city of St. Louis, in the State of Missouri, and with their locomotive engines and trains of cars, moved and propelled by steam, were at said time engaged in carrying and conveying passengers over said railroad for hire, and said de-

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fendant, on the 13th day of December, 1885, agreed and undertook for hire to carry over their said railroad, as a passenger, one George Naas from said city of Mt. Vernon to said city of St. Louis; that said Naas was at said time, from long protracted sickness, so weak and infirm in body as to be unable to rise from his bed without assistance, of which sickness and infirmity of the said Naas the defendant at the time aforesaid had due notice; that, by reason of said infirm and feeble condition of said Naas, it was at said time necessary for him to be carried from the station of the defendant at Mt. Vernon and placed upon the cars of the defendant for the purpose of commencing said journey to St. Louis; that the plaintiff, with other friends of said Naas, undertook to assist in carrying said Naas at said time from the station of the defendant at Mt. Vernon and to place him upon the cars, at the time ready for the reception of passengers at said place, the defendant at the time agreeing with and promising said Naas, of which agreement and promise the plaintiff had knowledge before he took upon himself said charge and burden aforesaid, that the defendant would stop its locomotive engine and cars at said station a sufficient length of time not only to permit the said Naas to be carried aboard the said cars by the plaintiff and other friends of said Naas, but also a further time sufficient for the plaintiff and other assistants to leave the cars in safety; that, upon the arrival of said defendant's train of passenger cars at their station at Mt. Vernon on said day, none of the defendant's servants, agents or employees aided, or offered to aid, in carrying said Naas on board of the said defendant's cars, and thereupon the plaintiff, with the assistance of two other friends of said Naas, relying upon said promise and agreement of said defendant so made with said Naas, and by him theretofore communicated to plaintiff, forthwith proceeded, in the presence and view of the defendant's agents and servants who had charge and control of said train, to carry, and did with the utmost dispatch carry, said Naas from said station and place

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him upon one of the cars of the defendant, to be by the defendant carried as a passenger over its said railroad to said city of St. Louis, in pursuance of its agreement; that, upon placing said Naas on board of said car, the plaintiff and said other assistants immediately thereafter proceeded to leave said car without delay; that the defendant caused its said locomotive engine and train of cars to be slowly moved forward at the instant the plaintiff and the other assistants began leaving said car; that said other assistants stepped from said car upon defendant's platform at said station while said cars were slowly moving forward as aforesaid, without difficulty and without injury; that he, the said plaintiff, was following so closely behind said other assistants when they so stepped off that he could easily have laid his hand upon them, and was making reasonable haste in getting off said car, as the defendant then and there well knew, but at the instant he was in the act of stepping off the lower step of the platform of said car upon the platform of said station, the defendant negligently and wrongfully caused the motion of said car to be suddenly and greatly accelerated, by reason whereof the plaintiff was, without any fault or negligence on his part, thrown violently upon and from the platform of said station, and upon the track of the defendant's railroad, and the said cars of the defendant, without any fault or negligence on his part, ran upon and over his right foot and ankle, crushing the bones thereof to such an extent as that four of his toes had to be amputated. Then follow further allegations as to the nature and extent of the injury.

There was a demurrer filed to the complaint, and overruled, and that ruling is assigned as error, but it is not discussed by counsel and is therefore waived.

The appellant filed a motion to require the appellee to make the complaint more specific, by stating and showing what agent or employee of the defendant caused the motion of the cars to be suddenly and greatly accelerated, and what

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acts of such agent caused the motion of the cars to be suddenly and greatly accelerated ; also, that he be required to show how, or in what respect, such acts of said agent were negligent and wrongful. The motion was overruled, and this is complained of as error. The motion was properly overruled. The pleading must be construed in the light and knowledge possessed by mankind of the manner and by whom passenger trains are run and operated, and the allegations of the complaint are to be treated as relating to and meaning the employees and agents of the defendant running and operating the train of cars, and are sufficiently certain and specific. Furthermore, the plaintiff is not bound to plead facts which are peculiarly within the knowledge of the defendant.

The appellant moved for judgment in its favor on the special findings, notwithstanding the general verdict; this motion was overruled, and the ruling assigned as error.

The answers to interrogatories showed the following facts : That the plaintiff went upon the train to assist Naas, at the request of the family ; that the train was in motion before plaintiff left the car in which Naas was seated, and when he was upon the platform for the purpose of leaving the train, and that plaintiff knew it was in motion ; that the train was moving at the rate of four and one-half miles an hour when plaintiff got on the lower step for the purpose of alighting from the train.

The answers to the fourth and fifth interrogatories are conflicting. The fourth interrogatory and answer are to the effect that neither the conductor nor engineer, in charge of the train and engine, knew that plaintiff was on the steps of the car, or that he purposed leaving the train, or that he was in the act of alighting from the train at the time he did attempt to leave it. Interrogatory five and answer are to the effect that the conductor knew that the plaintiff was on the train when it started and that he purposed leaving the train before he had left it. This leaves the interrogatories showing this state

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of facts, viz.: That plaintiff went upon the train to help Naas, at the request of Naas' family; that the train was in motion before he left the car, and continued in motion until plaintiff got on the step for the purpose of leaving, and that he knew the train was in motion; that when he was upon the lower step for the purpose of alighting from the train, the train was moving at the rate of four and one-half miles an hour, and that the conductor knew plaintiff was on the train, but did not know he was upon the steps of the car, or was in the act of alighting, when he made the attempt to leave the train.

The answers to interrogatories did not entitle the appellant to judgment. It is only where there is a direct conflict between the general verdict and the interrogatories and answers thereto, and where the facts found by the answers to the interrogatories entitle the party in whose favor they are to a judgment, that a motion for judgment on the answers to interrogatories, notwithstanding the general verdict, will be sustained. *McClure v. McClure*, 74 Ind. 108; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412.

In the case of *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88, 96, it is held that all reasonable presumptions are indulged in favor of the general verdict, while nothing will be presumed in favor of the special findings. Under these well settled principles, which have been universally adhered to by this court, there was no error in overruling appellant's motion for judgment on the answers to interrogatories, notwithstanding the general verdict. All the facts established by the answers to the interrogatories might be true, and yet the appellee entitled to recover.

It is insisted by counsel for appellant that the answers to interrogatories show that the train of defendant was in motion before the plaintiff left the car in which said Naas was seated, and when the plaintiff came upon the platform of said car, and when he got on the steps of said car for the purpose of leaving it, as was known to him, and that when

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plaintiff reached the lower step for the purpose of alighting from the train it was moving at a speed of four and one-half miles per hour; and that the law is, that when a railroad station has been announced, and the train has been stopped, there is an invitation to passengers to alight, and an implied promise, and an obligation, that the stop shall be long enough to give all passengers a reasonable time to leave the train in safety, but after the train has started from the station, and especially when it has obtained a speed which proclaims to every one that the movement is final, there is no longer an invitation to any one to leave the train, and one who thus attempts to leave it does so without the invitation or consent of the railroad company, and at his own risk; that the effect of the finding in this case was, that the train had acquired such speed at the time the appellee alighted as to proclaim to every one that the movement was final, and that the alighting under such circumstances is a conclusive presumption of contributory negligence and the appellee can not recover, and it was the duty of the court to render judgment in favor of appellant; that when the facts show the train to have been moving at the rate of four and one-half miles an hour when a person alights from the train, the court shall declare, as a matter of law, that such act of alighting is negligence, and that the person can not recover though injury may have resulted to him by reason of the negligence of the employees of the railroad company.

— We do not concur in this theory of counsel. The fact that a person voluntarily alights from a moving train is not a conclusive presumption of negligence on his part. The rate of speed the train has acquired, the place, and all the circumstances connected with the alighting, are to be taken into consideration in determining whether or not the person was guilty of negligence on his part in leaving or attempting to leave the train. The degree of speed which would of itself make the person guilty of negligence in one case, and under some circumstances, would not under others. We do not

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mean to say that the court would not hold that a person who voluntarily left a passenger train when in full speed was not guilty of negligence, and that such act alone would be construed to constitute such contributory negligence as that he could not recover for injuries received; but like crossing the railroad track, while it might be negligence to attempt to cross the track with horses and vehicles, when the train was within a few rods running at high speed, it might not be when the train was at a much greater distance and running at a less rate of speed, though it was in sight. It might be negligence to attempt the crossing of a track with horses and a vehicle, when it would not be to do so on foot. So, too, what one in the full vigor of manhood might do with perfect safety, might be hazardous for one who is decrepit with age or in an enfeebled condition. Whether alighting from a moving train constitutes negligence or not is a fact to be determined by the jury trying the cause, taking into consideration all the circumstances in connection with the alighting.

In this case the passenger Naas being in an enfeebled condition, requiring the assistance of others to carry him upon the train and place him in a seat, the defendant's employees having knowledge of his condition, and observing others carrying him into the car, they owed an obligation to those assisting and carrying him into the car to allow the train to remain standing a sufficient time to allow them a reasonable opportunity to leave the train, and to those whose assistance was necessary, and whose services in that behalf were accepted by the passenger Naas, the company owed the same duty in allowing them a reasonable time to leave the train as it would had they been passengers upon the train, though they voluntarily offered their services.

In the case of *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441, at p. 447, the court, in speaking of a person leaving a train while in motion, says: "If the leap was made under such circumstances that a person of ordinary caution and care



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would not have apprehended danger therefrom, then it was not such an act of carelessness as would relieve the defendant from the responsibility otherwise resting upon it." And this statement of the law by the court is quoted and approved in the case of *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48. In the case of *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261, the court states the rule as to when the question of negligence should be submitted to a jury. See, also, *Pennsylvania Co. v. Long*, 94 Ind. 250; *Town of Albion v. Hetrick*, 90 Ind. 545.

The first cause assigned for a new trial was the giving by the court, at the request of the plaintiff, instructions one, two, three and five. We set out some of the instructions. Number one is as follows:

"1. If you believe from the evidence that at the time mentioned in the complaint the defendant, for hire, agreed to receive and did receive on board its train of cars at its passenger station at Mt. Vernon, Indiana, one George Naas, as a passenger, and that the defendant had knowledge that said Naas was at the time so sick and feeble as to render it necessary for him to be carried into defendant's car, and the conductor of said train, then present, had knowledge, or had reasonable grounds to believe, that the plaintiff entered said car as an assistant in carrying said Naas therein and in seating said Naas in said car, then you may find that the plaintiff rightfully entered said car, and that the defendant owed the plaintiff the same duties, while he was rendering said assistance to said Naas, and while he was leaving said car, that it would owe to any of its passengers for hire."

This instruction was proper. The defendant, in contracting to carry the passenger Naas in his sick and enfeebled condition, contracted an obligation which could only be carried out by Naas being carried upon the train and seated in the car. By thus contracting to carry Naas as a passenger, it took upon itself the obligation of allowing him assistants to place him upon the train and seat him in the car, and the



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compensation received by the defendant for conveying Naas from Mt. Vernon to his destination included as well the right to have assistants place him in the car as the carrying him after being so placed in the car, and the defendant owed the same obligation to his assistants while necessarily entering and leaving the car with Naas as it owed to Naas himself.

Instruction No. 2 states the legal obligation of carriers of passengers for hire, and it is not erroneous in connection with the other instructions.

Instruction No. 3: "If you find from the evidence in this case, and under the instructions I have given you, that the plaintiff rightfully entered the car at its station at Mt. Vernon, as an assistant in carrying said Naas into said car, and the conductor of the train of which said car was a portion knew, or ought to have known at the time, that the plaintiff had, in the capacity of such assistant, entered said car, then you should find that it was the duty of the defendant to cause said car to remain stationary at said station such a length of time as would, in your judgment, under all the circumstances proved, be sufficient to enable the plaintiff to leave the car while it was thus standing; and if you find that the train was started by defendant before such reasonable time had elapsed, and that the plaintiff attempted to leave the car while in motion, but while the motion thereof was yet slow, that a person of ordinary caution and prudence would apprehend no danger in stepping therefrom, and that when the plaintiff was in the act of stepping from the steps of the car platform to the station platform, if you should so find, the motion of the train was suddenly increased by the fault and negligence of the employees of said road, and that by reason of such sudden increase of speed the plaintiff was thrown on to the track of the defendant and received the injury complained of, you will find for the plaintiff, unless you further find that he was guilty of want of ordinary care and prudence which directly contributed to produce the injury."

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This was a proper instruction, and applicable to the issues in the case. The complaint alleges the contract to carry Naas, in his sick and enfeebled condition, the necessity for assistants, and knowledge of such facts on the part of the defendant; that the plaintiff entered the car as an assistant to Naas. It fairly appears that the train failed to remain standing a sufficient time for the plaintiff and other assistants to leave the car, and that it moved slowly as plaintiff was leaving the car, so that he could have alighted in safety had it not been for the fall. When he was upon the step in the act of alighting, there was a sudden acceleration of speed, caused by the negligence of the employees of defendant operating and running the train, by reason of which plaintiff was thrown violently upon and from the platform and upon the track and run over, without fault on his part. And this instruction is based upon the same theory; that if the plaintiff rightfully entered upon the car as an assistant of Naas, and the conductor knew it, or had reason to know it, he should have allowed the train to remain stationary a sufficient length of time for plaintiff to have left the train; and if he failed to do so, and started the train slowly, and continued to run so slowly that a person of ordinary prudence and caution would have apprehended no danger in stepping therefrom, and while the car was thus moving, and the plaintiff was in the act of stepping off on to the platform of the depot, the employees, carelessly and negligently, suddenly accelerated the speed of the car, and by reason of such sudden increase of speed plaintiff was thrown on the track of the defendant and received the injury complained of, the defendant would be liable, unless the lack of ordinary care or prudence of plaintiff directly contributed to the injury.

The fifth instruction states the law properly as to the amount of recovery in the event the jury find for the plaintiff, and is not erroneous.

The next error assigned is the refusal of the court to give instructions one, two and eight requested by the defendant.

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They all proceed upon the theory that if the plaintiff knew the train was in motion, and to avoid being carried from Mt. Vernon attempted to leave the train, and such attempt caused or contributed to the injury, he had no right to recover.

We can not adhere to the doctrine that the attempt to voluntarily leave a moving train, regardless of the speed and circumstances under which the attempt is made, is negligence *per se*, and if injury occurs in alighting, by reason of the negligence of the employees of the railroad company, that there can be no recovery. Though that doctrine has been held in some cases, yet it is in opposition to the decisions of this court hereinbefore cited, and we think against the best considered cases of other States.

In the case of *New York, etc., R. R. Co. v. Coulbourn*, 69 Md. 360, the court says: "The court rejected the defendant's fourth prayer, and in doing so we think it committed no error. By that prayer the court was asked to instruct the jury, that if they should find that the car was moving at least at the rate of five miles an hour, at the time the plaintiff jumped therefrom, then such act of the plaintiff was negligence on his part, and their verdict should be for the defendant. This prayer excluded from consideration all the facts and circumstances of the case, under which the plaintiff acted, except the single fact that he jumped from the car when it was moving at the rate of five miles per hour; and if the jury should find that fact, then, the court was asked to say as matter of law, there was such negligence on the part of the plaintiff as would preclude his right to recover, without regard to the other facts of the case. But, in our opinion, all the facts and circumstances of the case were properly left to the consideration of the jury; and it was for them to determine, as matter of fact, whether the plaintiff, in jumping from the car, acted as a reasonably cautious man would do, under like circumstances." *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53; *Filer v. New*

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*York, etc., R. R. Co.*, 49 N. Y. 47; *Pennsylvania R. R. Co. v. Kilgore*, 32 Pa. St. 292; *Clemens v. Hannibal, etc., R. R. Co.*, 53 Mo. 366; *Delamatyr v. Milwaukee, etc., R. R. Co.*, 24 Wis. 578; *Strauss v. Kansas City, etc., R. R. Co.*, 14 Cen. Law J. 355.

It is proper to consider the further question as to whether there was evidence to support the verdict of the jury, and whether the charges given by the court were applicable to the evidence. We have examined the evidence. "There was evidence from which the jury might have reasonably found that Naas was sick, and in such a feeble condition as to require assistants to carry him on board the cars; that defendant's employees had knowledge of his condition at the time of selling him a ticket and contracting to carry him, and that the conductor was notified and saw the assistants carrying him into the cars, and was directed by the agent to give plenty of time; that no time was given to the assistants to leave the train; that the train was in motion by the time Naas was seated; that the train moved slowly until plaintiff was on the steps and in the act of stepping from the train, when the speed was suddenly increased; some witnesses describe it as moving with a lunge, others with a sudden motion, others that it started suddenly; and that the other assistants, just in front of plaintiff, landed safely. It may have been fairly found that the suddenly increased motion of the car threw the plaintiff upon the track, and that had it not been for that he would have landed safely, and that the employees were guilty of negligence in so moving and running the train.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed April 20, 1889; petition for a rehearing overruled June 27, 1889.

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No. 14,834.

DAVIS, ADMINISTRATOR, v. THE STATE, EX REL. LONG,  
PROSECUTING ATTORNEY.

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**TAXES.—False List.—Penalty.—Survival of Action for.**—A cause of action to recover the penalty imposed by section 6339, R. S. 1881, upon any person who gives a false and fraudulent list or statement of his taxable personal property, does not die with the taxpayer, but, under section 283, R. S. 1881, survives and may be maintained against his personal representative.

**SAME.—New Right of Action.—Subject to General Statutes Regulating Limitation and Survival.**—Whenever a new right of action is given by statute, the right is subject to all general statutes regulating the limitation and survival of actions, unless it is expressly excepted therefrom.

**SAME.—Complaint to Recover Penalty.—Insufficiency of.**—It is only for failing to give a correct list of the property owned on the 1st day of April of any current year that the penalty is prescribed, and where the complaint to recover the penalty merely alleges that the taxpayer gave a false statement of the property owned by him "in the years 1885 and 1886," it is bad.

From the Washington Circuit Court.

*D. M. Alsbaugh* and *J. C. Lawler*, for appellant.

*S. B. Voyles*, for appellee.

MITCHELL, J.—Section 6339, R. S. 1881, imposes a penalty of not less than fifty dollars nor more than five thousand dollars upon any person who gives a false or fraudulent list or statement of his taxable personal property, which is required by law to be listed, when called on for that purpose. It provides that the penalty may be recovered in any proper form of action, by the State of Indiana, on the relation of the prosecuting attorney, who is required to prosecute the offender to final judgment and execution, and who is allowed a commission of ten per cent. on all moneys collected, and a docket fee of ten dollars to be taxed and collected as costs.

This proceeding was instituted in the Washington Circuit

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Court by the prosecuting attorney, who filed a claim in the name of the State of Indiana, on his own relation, against the estate of John A. Bowman, deceased, in which it was charged that the decedent had given to the assessor of the township in which he resided a false and fraudulent list of his personal property for taxation in the years 1885 and 1886. The administrator prosecutes this appeal from a judgment assessing a penalty of \$920 against the estate of the decedent.

It is insisted that the cause of action died with the death of Bowman, that it is not within the statute regulating the survivorship of actions, and that the court therefore erred in entertaining it as a claim against the decedent's estate. *Qui tam* actions at common law—which were in their essential characteristics the same as the one under consideration—were those given by act of Parliament for the recovery of a penalty or forfeiture for the neglect of some duty or the commission of some crime. They were recognized as civil actions, or informations to recover the penalty, in the name of the sovereign, at the suit of an individual, who might prosecute as well for the king as for himself. 1 Bacon Abridgment, p. 88. The action was not to recover damages sustained by the plaintiff, but for penalties incurred by the defendant. They were in the nature of civil informations or suits, and the common law remedy was an action of debt. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, and authorities cited; *Durham v. State, ex rel.*, 117 Ind. 477. Statutory penalties are ordinarily in the nature of a punishment prescribed by law for the non-performance of an act, or for the performance of an act in an unlawful manner, and in some cases the penalty stands in lieu of the act to be performed. *San Luis Obispo v. Hendricks*, 71 Cal. 242.

Penalty involves the idea of punishment, and whether it is inflicted in a civil or criminal prosecution, its character is not changed. It may involve the payment of a sum of money or personal suffering. *United States v. Chouteau*, 102

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U. S. 603; *The Strathairly*, 124 U. S. 558. Nevertheless, debt lies for a statutory penalty, because the sum demanded is in the nature of a fixed or liquidated liability for a wrong done. *Chaffee v. United States*, 18 Wall. 516; *State, ex rel., v. Stevens*, 103 Ind. 55.

Although by the common law the action was in the nature of a civil information for a debt, *qui tam* actions on penal statutes were nevertheless designated as actions *ex delicto*, sounding in tort, and were therefore within the common law maxim which declared that all personal actions were extinguished by the death of the *tortfeasor*. The common law rule prevails generally in the United States, and actions to recover penalties prescribed by statute can not be maintained against the personal representative of a deceased wrongdoer, except in cases where the survivorship of such actions is controlled by statute. *Schreiber v. Sharpless*, 110 U. S. 76; *Stokes v. Stickney*, 96 N. Y. 323; *Jones v. Vanzandt*, 4 McLean, 604.

It is provided by statute that "In all cases where actions survive, they may be commenced by or against the representatives of the deceased to whom the interest in the subject-matter of the action has passed." Section 281, R. S. 1881. The statute also declares, in effect, that all actions which arise out of an injury to the person die with the person of either party, except in certain specified cases. Section 283 declares that all other causes of action survive, and may be brought against the representatives of the deceased party, except actions for promises to marry.

In *Western Union Tel. Co. v. Scircle*, *supra*, the court, in giving a construction to this last section, said: "When it is granted, as it must be, that there is a cause of action, and that it is not for an injury to the person, it follows with absolute logical certainty that the cause of action survives by force of the statute." This reasoning is conclusive of the question in the present case. If there was a cause of action of a civil nature to enforce a penalty incurred under the stat-

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ute existing at the death of Bowman, it survived against his personal representative by force of the statute. Jurists have found much difficulty in precisely defining a cause of action. Pomeroy Remedies, section 432. Generally speaking, it is the right which a party has to institute and carry through a proceeding. Anderson Law Dict., 157. "It may be said to be composed of the right of the plaintiff, and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute a cause of action." *Veeder v. Baker*, 83 N. Y. 156.

As we have seen, *qui tam* actions were recognized as civil actions at the common law, and although the action does not proceed altogether upon the theory of affording compensation to the State for an injury, there is nevertheless a right created by the statute in favor of the State to recover for a wrong done, and the wrong committed and the right to recover for it constitute the very essence of a cause of action. The conclusion follows that the cause of action thus created is embraced by section 283, which provides in effect that *all* causes of action, except for injuries to the person and actions for promises to marry, survive and may be brought against the personal representative of the deceased party. There is no force in the suggestion that the action does not survive, because the statute imposing the penalty and giving the right to sue was not enacted until after the enactment of the statute relating to the survival of actions. It could be argued with equal propriety and quite as much reason, that the statute of limitations, or any of the other general statutes regulating the time, place and manner of bringing and conducting suits, had no application to actions like the present. Whenever a new right of action is given by statute, the right is subject to all general statutes regulating the limitation and survival of actions, unless it is expressly excepted therefrom. We quite agree with the contention that it might have been provided in the statute giving the right that the action should not survive, but it is not so pro-



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vided, and the court can not engraft such a provision upon the statute by construction. In the absence of such a provision, the case is controlled by the general statute governing the subject of the survival of actions. The authorities cited fully sustain this proposition.

The judgment in the present case must, however, be reversed, because it is neither averred in the complaint nor found as a fact that the decedent owned the property which it is alleged he failed to list on the 1st day of April of any current year. The averments in the complaint are to the effect that the deceased gave to the assessor a false and fraudulent statement of the property owned by him in the years 1885 and 1886. This was not a sufficient averment. The law required the decedent to give a true and correct list of property owned by him on the 1st day of April of each year, and the penalties prescribed are for failing to make such a list as is required by law.

Courts can not create penalties by construction, but must avoid them by construction, unless the act for the doing or omission of which the penalty is claimed is brought clearly within the letter and the necessary meaning of the statute giving the right to the penalty. This is familiar law. *Burgh v. State, ex rel.*, 108 Ind. 132, and cases cited.

The judgment is reversed, with costs.

Filed June 21, 1889; petition for a rehearing overruled Oct. 16, 1889.

No. 14,184.

## BOWEN v. LINGLE ET AL.

**WIDOW.—Rights in Husband's Real Estate.—Land Held by Contract.**—Where a husband has made a contract for land, but dies leaving a part of the consideration unpaid, his widow is entitled to her statutory interest therein if the land not set off to her is sufficient to pay the unpaid purchase-money.

**SAME.—Liens.—Payment of.—Rights of Widow.**—Upon the death of a husband an equity intervenes in favor of his widow to have all the personal property of her deceased husband, and the proceeds of all his real estate to which she is not entitled under the law, applied to the payment of the liens on the land of which he died seized.

**SAME.—Mortgage.—Vendor's Lien.—When Widow Holds her Interest Freed.**—A mortgage which a wife joins her husband in executing upon his land, to secure his debt, in no manner affects her rights in other lands belonging to her husband; and if the latter dies holding land for which he has contracted but not paid, and a portion of which his wife has joined him in mortgaging to a third person, and the widow, by proper proceedings, has her interest set off to her from the portion of the land not mortgaged, the mortgagee can not, as against the widow, compel the person holding the purchase-money lien to resort to the land set off to her before selling the land covered by the mortgage, and if the land not set off to her is sufficient to pay the vendor's lien, she holds free from the liens of both vendor and mortgagee.

From the Tippecanoe Circuit Court.

*R. P. Davidson, J. C. Davidson, J. R. Coffroth and T. A. Stuart*, for appellant.

*R. Jones and J. W. Wilstach*, for appellees.

**COFFEY, J.**—William S. Lingle, of Tippecanoe county, died intestate, on the 2d day of September, 1884, leaving as his widow Frances E. Lingle. At the time of his death he was the owner and in the possession of eighteen hundred and eighty-three acres of land in this State, which he held under a written contract with the appellee White, for the purchase of the same. Said White holds a purchase-money lien on all of said land, amounting to seventeen

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thousand five hundred and eighty-seven dollars and fifty cents. After said contract of purchase, to wit, on the 11th day of December, 1877, said William S. Lingle and his wife, the appellee Frances E. Lingle, executed a mortgage on 943 acres of said land to the appellant, Abner H. Bowen, to secure a loan to the said William S. Lingle, upon which there is now due the sum of \$21,411. In a partition suit brought by the said Frances E. Lingle in the Benton Circuit Court, in the year 1886, against the heirs, to which neither the said White nor the appellant Bowen was a party, she had set off to her, as the widow of the said William S. Lingle, one-fifth of said land, as against creditors. The land so set off to her does not include any of the lands mortgaged to the appellant, Bowen, but is subject to the purchase-money lien of the said White. The land remaining, after setting off to the appellee Frances E. Lingle her one-fifth, as widow, is sufficient to pay the purchase-money lien of the said White, but is not sufficient to pay said purchase-money lien and the mortgage debt of the appellant.

The controversy between the appellant, Bowen, and the appellee Frances E. Lingle is this: Can the said Bowen, in equity, require said White to first exhaust the land not covered by appellant's mortgage before resorting to the lands included in it, or whether the said Frances E., as the widow, is entitled to have the land set off to her protected and preserved intact, in case the other lands will pay and discharge the debt of the said White, although not paying the said Bowen.

It is contended by the appellant that as the land in controversy was land which William S. Lingle held under a contract, the full purchase-price of which had not been paid, the appellee was not entitled to any part of the land itself, as the widow, but that she could only take an interest in the money remaining after sale to pay the vendor's lien.

By section 2483, R. S. 1881, the wife, upon the death of

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the husband, takes one-third of his land, in fee, against the heirs, and also against creditors, unless it exceeds ten thousand dollars in value.

Under section 2491, she is entitled, with the exception above stated, to one-third of all the land of which the husband was seized in fee during the marital relation, in the conveyance of which she has not joined in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death.

Section 2493 is as follows: "If the husband shall have made a contract for lands, and, at the time of his decease, the consideration in whole or in part shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate, his widow shall have one-third of said lands in the same manner as if the legal estate had vested in the husband during coverture."

Under the facts as above set out, we think that the appellee Frances E. Lingle, as the widow of William S. Lingle, was entitled to an interest in the lands purchased from White. It is true that the purchase-price has not yet been paid in full, but it is shown that the land not set off to her is sufficient to pay it, and we know of no rule of law which would keep her from the use of her interest in the land until by the slow process of law the debt due for the price of the land had been actually paid.

The most difficult question in the case arises out of the equities between the appellant and the appellee Frances E. Lingle, growing out of the execution of the mortgage to the appellant. If William S. Lingle were living, it can not be doubted that the appellant, as against him and White, could compel White to exhaust the property not covered by his mortgage before resorting to any portion of that land. *Day v. Patterson*, 18 Ind. 114; *Cissna v. Haines*, 18 Ind. 496; *Aiken v. Bruen*, 21 Ind. 137; *Alsop v. Hutchings*, 25 Ind. 347; *Williams v. Perry*, 20 Ind. 437; *McCullum v. Turpie*, 32 Ind. 146; *McShirley v. Birt*, 44 Ind. 382; *Houston v.*

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*Houston*, 67 Ind. 276; *Hahn v. Behrman*, 73 Ind. 120; *Sidener v. White*, 46 Ind. 588; 2 Jones Mort. (3d ed.), sections 1620 to 1622; *Edwards v. Applegate*, 70 Ind. 325; *Russell v. Houston*, 5 Ind. 180; *Plain v. Roth*, 107 Ill. 588.

It must be conceded, however, that the widow has many rights not possessed by the husband. It is the policy of the law to so administer the estate of the deceased, if it can be done, as to secure to the widow her interest in the husband's lands. To this end it is the duty of the administrator to apply all the personal assets in his hands, if necessary, to pay liens on the land, even to the exclusion of all general creditors; not only is this his duty, but he is likewise bound to apply the proceeds of the sale of two-thirds of the deceased husband's land, if necessary, to that purpose. *Hunsucker v. Smith*, 49 Ind. 114; *Morgan v. Sackett*, 57 Ind. 580; *Sparrow v. Kelso*, 92 Ind. 514.

It is the right of the widow, at any time when the administrator fails to perform this duty imposed upon him by law, to compel, by proper appeal to the courts, such performance. It will thus be seen that upon the death of William S. Lingle an equity intervened in favor of the appellee to have all the personal property, and the proceeds of all of his real estate to which she was not entitled under the law, applied to the payment of the liens on the land of which he died seized. The question now is, who has the superior equity?

Had the appellee not signed the mortgage which the appellant holds, we do not think it would be contended by him that as against her he could compel White to exhaust the land to which she is entitled under the law before resorting to the land covered by his mortgage. It becomes important, therefore, to ascertain what effect the execution of said mortgage has upon her rights in the lands of her late husband.

In the case of *Trentman v. Eldridge*, 98 Ind. 525, this court, by ELLIOTT, J., in speaking of the effect of a mortgage executed by a wife in connection with her husband upon his land, to secure his individual debt, says: "It did

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not impose a personal liability upon her, nor did it extend to any other rights than such as she held as the wife of the principal debtor. The promise in the mortgage \* \* \* made it effective so far as a right to a foreclosure is concerned, but, as it was an executory contract, it created no personal liability against her. \* \* As the promise contained in the mortgage did not bind Mrs. Eldridge, and as her conveyance, by way of mortgage, operated only upon her interest in the character of wife of the principal debtor in the particular land described, she does not occupy the position of a debtor endeavoring to defeat the foreclosure of a mortgage executed to a creditor."

If this statement of the law is correct, and that it is we have no doubt, it follows that the only effect of the mortgage executed by the appellee, in connection with her husband, to the appellant, so far as her rights are involved, was to bind the land therein described, and that it in no manner affects her rights in other land. The lands set off to appellee by the circuit court of Benton county, therefore, as they are not covered by the appellant's mortgage, are in no way affected thereby. When the appellant took his mortgage he was chargeable with knowledge of the law, which required the administrator to pay off the liens against the land in such a manner as to save to the widow her interest therein, and that such right entered into and constituted a part of his contract with William S. Lingle. He was bound to know, also, that in the event Lingle should die before his mortgage debt was paid, his widow could compel White to exhaust all the other lands before resorting to that which descended to her. In our opinion the appellant has no right to compel White to resort to the land set off to the appellee before the sale of the lands covered by his mortgage. If the other lands are sufficient to pay the vendor's lien held by White, we think the appellee is entitled to hold the land set off to her, as widow, free from the liens of both White and the appellant. This being the conclusion at which the cir-

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cuit court arrived, it follows that there is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed March 13, 1889 ; petition for a rehearing overruled June 28, 1889.

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No. 13,824.

119	565
1169	158

WINSLOW ET AL. v. DONNELLY.

**WILL.**—*Collateral Attack upon.*—*Action to Quiet Title.*—A will which has been duly admitted to probate in another State can not be attacked in an action to quiet title brought in this State, although the execution of the will was procured by fraud.

**PRACTICE.**—*Finding of Trial Court.*—*Inferences in Support of.*—The finding of the trial court will not be disturbed where the evidence supplies grounds for inferences in support of it.

From the Porter Circuit Court.

*E. D. Crumpacker* and *P. Crumpacker*, for appellants.

*W. E. Pinney* and *A. L. Jones*, for appellee.

**ELLIOTT, C. J.**—The appellants seek a decree quieting title, and allege in their complaint that their title is clouded by a devise to the appellee. They aver that the will containing the devise was procured by the fraud of the devisee, who induced the testatrix to marry him, although he had a wife living at the time, from whom he had not been divorced.

The complaint also alleges that the will “was duly admitted to probate in the District Court of Cedar county, in the State of Iowa, and a duly authenticated copy of said will, and the probate thereof from said District Court of Cedar

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county, has been filed and recorded, under the provisions of the statutes of this State, in Porter county."

The trial court did not err in sustaining the appellee's demurrer to the complaint. The judgment of the District Court of Cedar county, Iowa, precludes the appellant from attacking the will in an action to quiet title. Whether a direct attack upon the will for fraud could be maintained is not the question, for the present attack is a collateral one, and is unavailing. The decision in *Harris v. Harris*, 61 Ind. 117, goes much farther than we are required to do here, for it denies the right to attack in any method and for any cause. It is possible that the decision we refer to attaches greater force to the fourth article of the Federal constitution than it is entitled to receive under the decisions of the Supreme Court of the United States; but, however this may be, we think it quite clear that the present attack can not be successful. *Robertson v. Pickrell*, 109 U. S. 608.

Our reasons for holding that the present attack is unavailing are: 1st. That the general rule is that the judgment of a court of competent jurisdiction can not be collaterally impeached; and, 2d. That if the will here under mention can be impeached at all for fraud, it must be in the method provided by statute, and not in an action to quiet title. The American decisions declare that a will which has been admitted to probate can not be set aside, upon the ground of fraud, in a collateral proceeding. *Case of Broderick's Will*, 21 Wall. 503; *State v. McGlynn*, 20 Cal. 233.

The cross-complaint of the appellee is substantially an ordinary complaint to quiet title, and alleges that the cross-complainant is the owner in fee of the land. The appellants answered the cross-complaint, alleging that the only claim of title the cross-complainant had was that conferred by the will, and that the will was procured by his fraud in representing himself to the testatrix as her husband, when he was, in fact, married to another woman at the time he assumed to marry the testatrix. The answer avers that the



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will was duly admitted to probate by the District Court of Cedar county, Iowa, so that the question is substantially the same as that presented upon the complaint. For the reasons already given, the answer must be declared insufficient. It is pleaded as a bar to the cross-action, and seeks to collaterally impeach the judgment of the Iowa court, and this, as we have seen, can not be done in this action.

There is some confusion in the record, but we think it sufficiently clear that the demurrer was addressed to the cross-complaint, and not to the answer of general denial.

The agreement of the parties, and the other evidence in the case, supplied grounds for inferring that the land claimed by the appellee is the same as that mentioned in the devise to him. This is sufficient to sustain the finding of the trial court. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476 ; *Heaton v. Shanklin*, 115 Ind. 595.

Judgment affirmed.

Filed June 28 1889.

No. 10,578.

**LANGE ET AL. v. DAMMIER ET AL.**

**WILL.—Contest.—Bond.—Time of Filing.**—While a proceeding to contest a will should be dismissed if the bond required by the statute is not filed, yet if a good bond is tendered after the proceeding is commenced it should be accepted.

**SAME.—Complaint to Contest.**—General allegations that a will was unduly executed, and that the testator was a person of unsound mind, make a complaint good under the statute relating to the contesting of wills.

**SAME.—Probate.—Res Judicata.—Query,** whether the record of the probat-

119	567
121	304
119	567
127	445
119	567
131	407
119	567
135	504
136	36
119	567
144	490
146	370
119	567
154	878
119	567
163	484

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Lange et al. v. Dammier et al.

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ing of a will has the effect of an ordinary judgment, and is conclusive as to the due execution of the will, except in an action under the statute to contest its validity.

CONVEYANCE.—*Insanity.—Disaffirmance.—Complaint.*—A complaint to recover real estate alleged to have been conveyed by an insane grantor, without consideration, is good on a motion in arrest of judgment, although it does not aver a disaffirmance before the commencement of the action.

PRACTICE.—*Supreme Court.—Questions Depending on Evidence.*—Questions which depend upon the evidence will not be considered where all the evidence is not in the record.

SAME.—*Arrest of Judgment.*—Where the court has acquired jurisdiction of the parties, and has jurisdiction of the subject-matter, judgment will not be arrested if the complaint contains one good paragraph.

SAME.—*Verification of Pleading.—Waiver of Objection.*—An objection on account of a failure to verify a pleading is waived unless made before entering upon the trial, and is therefore not presented by a motion in arrest of judgment.

From the Allen Circuit Court.

J. Q. Stratton, I. Stratton, S. M. Hench and T. W. Wilson, for appellants.

W. G. Colerick, H. Colerick and W. S. Oppenheim, for appellees.

BERKSHIRE, J.—This is an action between the children of William Lange, Sr., who died testate, in Allen county, on the 28th day of February, 1879. The controversy is over the title to certain real estate to which at one time the deceased held the title.

The amended complaint is in two paragraphs; both paragraphs describe the land; the first paragraph alleges that the appellee Hannah Dammier claims title by virtue of a deed executed to her by the decedent on the 4th day of January, 1877, and by his last will and testament executed on the 27th day of February, 1879; that the deed was executed without consideration; that the will was admitted to probate on the 6th day of March, 1879, and that when both instruments were executed the decedent was a person of unsound mind.

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*Lange et al. v. Dammier et al.*

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The second paragraph relates alone to the will, and alleges that the appellee Hannah Dammier claims title to the real estate by virtue of the will, which was probated on the 6th day of March, 1879, and that when the will was executed the testator was a person of unsound mind, and that the will was unduly executed.

The second paragraph of the complaint is verified, but the first paragraph is not. Some days after the amended complaint was filed, over the objection of the appellees, the appellants filed a bond as required by the statute in actions to contest wills. Upon the failure to file a bond in an action to contest a will the court should dismiss the proceedings; but as the filing of the bond is not a condition precedent to the right of the court to exercise jurisdiction, whenever a good and sufficient bond is tendered it should be accepted. This can work no prejudice to the contestees, because when the bond is filed the covenants of the obligors relate to the commencement of the action, as though the bond had been filed in the beginning.

The appellees answered by filing a general denial, and the issues joined were submitted to a jury, who returned a verdict for the appellants. The appellees filed a motion for a new trial, which the court overruled, and the proper exception was reserved in the record.

After the motion for a new trial was overruled, the appellants moved for judgment upon the verdict, and the appellees interposed a motion in arrest of judgment. The court overruled the former and sustained the latter motion, and the appellants excepted.

The appellants assign two errors: 1. Overruling their motion for judgment in their favor upon the verdict of the jury. 2. Sustaining the motion of the appellees in arrest of judgment.

The appellees assign a cross-error, viz., the overruling of their motion for a new trial.

All the questions presented by the cross-error depend upon

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the evidence. The evidence is not all in the record. The depositions of Henry Dammier and Hannah Dammier were introduced in evidence by the appellants, but these depositions are not in the record. Dr. G. B. Steman testified as a witness for the appellants. In his examination in chief he stated: "I am a physician; on the hypothetical question propounded to Dr. Gobrecht, which I heard, my opinion is that the facts stated would be evidence of a derangement of mind." The hypothetical question to which the answer was given is not in the record; nor are the facts embodied in the question made a part of the witness' testimony in narrative form. The hypothesis is necessarily a part of the witness' testimony; without it his opinion is unintelligible—a mere empty shell. We are compelled to disregard the cross-error.

The errors assigned by the appellants present the same questions and may be considered together.

It is a settled rule of practice in this State not to arrest judgment if the court has acquired jurisdiction over the person, and has jurisdiction of the subject-matter, if there is one good paragraph in the complaint. *Baddeley v. Patterson*, 78 Ind. 157; *Jones v. Jones*, 97 Ind. 188; *Louisville, etc., R. W. Co. v. Fox*, 101 Ind. 416.

There was no objection made because of the failure to verify the first paragraph of the complaint, except so far as the motion in arrest of judgment may be regarded as an objection. Had an objection been made at the proper time, and in the proper manner, it would have been the duty of the court to have stricken out all averments relating to the execution of the will and the mental condition of the testator, unless a verification of the paragraph had immediately followed the objection; but the appellees having joined issue, submitted to a trial, and a verdict having been returned, without any objection having been made, all right to object was waived. *Sutherland v. Hankins*, 56 Ind. 343, see pages 356, 357; *Pudney v. Burkhart*, 62 Ind. 179. Where the verification of a pleading is required, the proper practice

is to move its rejection for want of verification, and if part, but not all, of the averments require that the pleading shall be verified, and it is not, then such part should be rejected on motion. *Sutherland v. Hankins*, *supra*; *Decker v. Gilbert*, 80 Ind. 107; *Pudney v. Burkhart*, *supra*; see *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Turner v. Cook*, 36 Ind. 129; *Hagar v. Mounts*, 3 Blackf. 57; *Hagar v. Mounts*, 3 Blackf. 261; *McCormick v. Maxwell*, 4 Blackf. 168. The objection should be made before entering upon the trial, otherwise it comes too late.

Neither paragraph of the complaint is drawn with artistic accuracy, but the general allegations that the will was unduly executed and the testator of unsound mind make the paragraphs good under the statute for the contesting of wills. R. S. 1881, section 2596; *Kenworthy v. Williams*, 5 Ind. 375; *Reed v. Watson*, 27 Ind. 443; *Willett v. Porter*, 42 Ind. 250; *Etter v. Armstrong*, 46 Ind. 197.

By the first paragraph the validity of the conveyance, as well as the will, is attacked. One of the allegations against the validity of the deed is, that the testator was a person of unsound mind when it was signed and delivered. This allegation makes the complaint good as to the deed, unless it is necessary to allege and prove a disaffirmance before the institution of the action. The gist of the action is mental incapacity in the grantor when the deed was executed. As it is alleged that the conveyance was without consideration, the appellants were required to do nothing to place the appellees *in statu quo*.

It has been held by this and other courts that some action, amounting to a disaffirmance, ought to be taken before a suit will lie to recover back real estate conveyed by a person of unsound mind, who was not at the time under guardianship, and that as against a demurrer the pleading is bad unless it avers a disaffirmance. But the holding is, that a simple notice, or the execution of a conveyance to a stranger to the transaction, amounts to a disaffirmance. These cases, we

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think, can only be upheld upon the ground that the law is not favorable to litigation, and that a person claiming the right to recover the title to real estate conveyed away by an insane person should not be allowed to sue for its recovery without giving the person holding under the conveyance an opportunity to reconvey without suit; otherwise, we think, the bringing of an action to recover the land would be as effectual a disaffirmance as the acts that we have named.

We quote the following from the opinion delivered by ZOLLARS, J., in the case of *Hull v. Louth*, 109 Ind. 315: "Nor can it be said, that as a condition precedent to the setting aside of the deed, she, or her guardian, must have disaffirmed the deed. As her mental incapacity has been continuous, she could not disaffirm, if that were necessary; and as her guardian was not appointed until after the suit was commenced, he could not have disaffirmed the deed before the bringing of the suit." But if a disaffirmance had been necessary, the guardian could have disaffirmed before filing the cross-complaint for his ward, which was the commencement of the action on her part to recover the land.

It is true that when the cross-complaint was filed in the case referred to the insane grantor had a guardian, but she had none when she made the deed. We refer to the case as an authority in support of the position that the act of disaffirmance, preceding an action to recover real estate conveyed by an insane person, is a mere technical requirement of the law to discourage litigation, and does not enter into or form a part of the legal right; if it does, the logical conclusion that must follow is, that in every case where the grantor was not under guardianship when the conveyance was made there must be some act of disaffirmance before bringing the action. But if placed upon the technical ground that the law discourages litigation, and therefore requires that an opportunity be given the party holding the title to reconvey without suit, and, where a good reason appears for not having disaffirmed, to excuse the technical requirement, then the

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distinction is a reasonable one which requires a precedent disaffirmance, where the action is brought by a person of sound mind, and not to require it where the action is brought for the benefit of a person of unsound mind.

If we are right in our conclusion, it must follow that the first paragraph was good after verdict and as against the motion in arrest of judgment. *Balliett v. Humphreys*, 78 Ind. 388; *Yeoman v. Davis*, 86 Ind. 189; *Hansher v. Hanshew*, 94 Ind. 208; *Sims v. Dame*, 113 Ind. 127.

There is another question discussed by counsel, that, so far as we know, has never been passed upon by this court, and that is, whether or not, under our mode of procedure for the probating of wills, when a will is probated the record thereof has the effect of an ordinary judgment, and is *res adjudicata* as to the due execution of the will, except in an action brought to contest the validity of the will as provided by statute.

In most of the States a notice of some kind is provided for, and the will is probated by the court, and the probate made a matter of record as a part of the proceedings of the court. In most of these States the record is regarded as a judgment binding upon all persons interested in the estate, as legatees or heirs, and the validity of the will is held to be *res adjudicata*. *State v. McGlynn*, 20 Cal. 233 (81 Am. Dec. 118); *Schultz v. Schultz*, 10 Grattan, 358 (60 Am. Dec. 335); *Holliday v. Ward*, 19 Pa. St. 485 (57 Am. Dec. 671).

But in other States a different rule prevails, and the admission of the will to probate only authorizes an administration on the estate, and the admission of the will as evidence in the settlement of the estate, and in all matters of litigation involving the rights of persons claiming thereunder. *Leighton v. Orr*, 44 Iowa, 679; *Newman v. Waterman*, 63 Wis. 612 (53 Am. Rep. 310); *Lorieux v. Keller*, 5 Iowa, 196 (68 Am. Dec. 696); *Michael v. Baker*, 12 Md. 158; *Ellis v. Davis*, 109 U. S. 485.

In New York the common law rule prevails, and when a

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will is admitted to probate the record is conclusive as to the personal, but not as to the real estate.

In our State a will may be admitted to probate before the clerk of the circuit court in vacation or by the court in term time. In either case no notice is required, and when a will is admitted to probate before the court, the clerk is directed merely to make just such a record as he would make in vacation without direction. It has been held, and is the settled law of this State, that the clerk of the circuit court can not exercise judicial powers.

Having given the question some considerable consideration as we find it in the record, and without intimating any opinion as to the result of our investigation, we have thought it not improper to say what we have said.

Judgment reversed, with costs, and the court below is instructed to sustain the appellants' motion for judgment on the verdict of the jury.

Filed June 4, 1889; petition for a rehearing overruled Sept. 19, 1889.

119	574
120	285
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143	201
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144	193
144	455

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159	169

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169	78
169	160

No. 13,750.

## BOULDEN ET AL. v. MCINTIRE.

**MARRIAGE.**—*Validity of.*—*Living First Husband.*—*Divorce will be Presumed.*

—In favor of the validity of a second marriage contracted by a woman while her first husband is alive, it will be presumed that the first marriage was legally dissolved by a divorce before the second was entered into, and one who asserts the invalidity of the later marriage must show that there had been no divorce.

**SAME.**—*Evidence.*—*Proof of Negative.*—*Burden.*—Where a negative is essential to the existence of a right, the party claiming the right has the



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burden of proving such negative; hence where one bases his claim to land upon the alleged invalidity of a marriage, he must, by proper proof, remove every presumption in favor of the legality of the marriage, although to do this he must prove a negative.

**SAME.**—*Conveyance.*—*Quieting Title.*—*Evidence.*—Where a widow has conveyed land acquired by virtue of a second marriage contracted by her, and her grantee sues to quiet title as against relatives of the husband who assert the invalidity of the marriage, a transcript showing that the grantor's first husband obtained a divorce from her in the courts of another State after the execution of the conveyance, does not, if admissible in evidence at all, overcome the presumption that the wife had prior to her second marriage obtained a divorce.

MITCHELL, J., dissents.

From the Clinton Circuit Court.

*J. V. Kent, J. W. Merritt, M. Bristow, M. B. Beard and A. H. Boulden*, for appellants.

*J. Claybaugh, T. H. Palmer and W. F. Palmer*, for appellee.

COFFEY, J.—This was an action in the Clinton Circuit Court, brought by the appellee against the appellants to quiet title to the land described in the complaint. The cause was put at issue by the general denial, and a trial by a jury resulted in a verdict for the appellee. A decree was rendered by the court upon said verdict quieting the title of the appellee to the land in dispute.

The appellants assign as error the ruling of the circuit court in overruling their motion for a new trial. The reasons assigned for a new trial were:

1st. That the verdict of the jury is contrary to law.

2d. That the verdict of the jury is contrary to the evidence.

3d. That the verdict of the jury is not supported by sufficient evidence.

It appears from the evidence in the cause, that Horace G. Boulden died, intestate, the owner in fee of the land in dispute, leaving no children, or descendants of children, but leaving a mother, and brothers and sisters. The said Hor-

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- ace G. Boulden was married to Eliza Street, in Clinton county, Indiana, on the 22d day of April, 1879, and he died in 1881, leaving her surviving him. Subsequent to his death she conveyed the land in dispute to Samuel Traver, who conveyed to the appellee in this cause. The appellants are the mother, and brothers and sisters of Horace G. Boulden, and resist the claim of the appellee to this land upon the ground that said Horace was not legally married to said Eliza, she at the time of said pretended marriage having a living husband.
- There is no conflict in the evidence relating to the marriage of Eliza Street prior to her marriage with Horace G. Boulden. It is shown by the evidence, beyond question, that she was married to Charles Limes, in Fayette county, in the State of Ohio, in the year 1873, and that the said Limes is still living. Indeed, the deposition of Charles Limes is on file in this cause, in which he testifies to the marriage.

It is contended, however, by the appellee, that inasmuch as the presumption of law is against crime, we must presume that Eliza Limes was divorced from her husband, in the absence of some showing to the contrary, and that it was not enough for the appellants to show that she had a living husband at the time of her marriage with Horace G. Boulden, but they must go a step further and show that she had not been divorced.

- In the case of *Yates v. Houston*, 3 Texas, 433, the parties appeared in Texas, as husband and wife, four years after the husband's separation from a former wife. The court held that "The rational presumption, after this lapse of time is, that the former wife was dead. \* \* The ordinary presumption in favor of the continuance of human life should not, under the facts of the case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their marriage."
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In the case of *Hull v. Rawls*, 27 Miss. 471, Mrs. Rawls filed her petition for dower, which was resisted by Hull, the administrator of James C. Rawls, deceased, on the ground

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that she was not the wife of Rawls, as he had a wife living at the time of his pretended marriage with the petitioner. The proof of the petitioner consisted of the record of her marriage, made in the clerk's office of Kemper county, in that State, showing the marriage was solemnized December 6th, 1848. On the part of the administrator it was proved that in 1844 James C. Rawls was living in Chickasaw county with a woman whom he treated as his wife, and that the parties were recognized as husband and wife in the community, and that Rawls had said at one time, in the presence of petitioner, that his former wife was then living in Georgia. The court said: "Aside from the statement of Rawls, there is nothing in the testimony which raises a suspicion against the validity of the marriage. The fact that the deceased was living in 1844 with a woman, believed to be his wife, is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. \* \* If the former wife had been living in Georgia, as stated by Rawls, she would not necessarily be his wife in a legal sense, for they may have been legally divorced."

In the case of *Dixon v. People*, 18 Mich. 84, the defendant was indicted for murder, and the prosecution sought to use Harriet Dixon, who claimed to be his wife, as a witness, and to show that she was not his wife, and, therefore, competent to testify, proved to the court that she was married in 1859 to one Phillips, in Livingston county, in that State. The wife was then called, and admitted her marriage to Phillips, but further stated that the last time she saw Phillips was in April, 1860, and had not heard of him since; that in 1862 she saw an account in the newspapers of the death of a man by the name of Phillips, who she supposed to be her husband; that she, believing him to be dead, married the defendant in March, 1865. Under this evidence she was

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allowed to testify, and the defendant excepted. Upon the point we are now considering the court says: "This evidence made a very clear and strong *prima facie* case of a valid marriage in good faith with the defendant; since, without reference to the newspaper report, the presumption of innocence—that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive—rendered it obligatory upon the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of the marriage with the defendant."

In the case of *Harris v. Harris*, 8 Bradwell (Ill.), 57, Harris sought to obtain a divorce from his wife on the ground that she had another husband living at the date of their marriage. The court, in discussing the question now under consideration, said: "When it is shown that a marriage has been consummated in accordance with the forms of the law, it is to be presumed that no legal impediments existed to their entering into matrimonial relations, and the fact, if shown, that either or both of the parties have been previously married, and, of course, at a former time having a wife or husband living, does not destroy the *prima facie* legality of the last marriage. The natural inference in such case is, that the former marriage has been legally dissolved, and the burden of showing that it has not been, rests upon the party seeking to impeach the last marriage. The law does not impose upon every person contracting a second marriage the necessity of preserving the evidence that the former marriage has been dissolved either by the death of their former consort or by decree of the court, in order to protect themselves against a bill for divorce or a prosecution for bigamy."

In the case of *Greensborough v. Underhill*, 12 Vt. 604, the court says: "Is the intermarriage of Burdick with the pauper, in 1836, rendered illegal and void from the fact of her intermarriage with Hyland in 1834, who, after a short cohabitation with her, absconded and has not since been heard of? To render the second marriage illegal and void,

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we must presume the continuance of the life of Hyland down to the time of the second marriage ; and though, as a general principle, we are to presume the continuance of life for the space of seven years, still, when this presumption is brought into conflict with other presumptions in law, it may be made to yield to them. We are in all cases to presume against the commission of crime, and in favor of innocence ; and the result will be, if we suffer this presumption to yield to the other, we, by presumption alone, pronounce the second marriage illegal and void, and the parties guilty of a heinous crime. \* \* In the case of *Rex v. Twining*, 2 B. & A. 386, the woman married again within the space of twelve months, after her husband had left the country ; and yet the presumption of innocence was held to preponderate over the usual presumption of the continuance of life, and this, too, in a case involving a question of settlement."

In the case of *Teter v. Teter*, 101 Ind. 129, William H. Clayton, at the time he was formally married to Mrs. Hannah A. Teter, had a wife living in the State of Ohio. At a time subsequent to this marriage, Mrs. Clayton, the first wife, obtained a divorce in Greene county, this State. Clayton and his second wife lived together as husband and wife after the granting of the divorce, and it was held that the law presumed a good common law marriage after such divorce was granted. ELLIOTT, J., who delivered the opinion in that case, said : " The presumption in favor of matrimony is one of the strongest known to the law. \* \* ' The law presumes morality, and not immorality ; marriage, and not concubinage ; legitimacy, and not bastardy.' "

In the case of *Squires v. State*, 46 Ind. 459, the defendant was prosecuted for bigamy. The only evidence tending to prove that the first wife was alive at the time of the second marriage was that she was living in Buffalo, New York, two years previous to the second marriage. The defendant was convicted. It was held by this court that this

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was no proof that she was living at the date of the second marriage, and the cause was reversed.

The presumption of the death of the former husband or wife, in the case of second marriage, is only one of the many presumptions the law indulges in favor of the validity of the second marriage. As the authorities cited abundantly establish, *every* presumption is to be indulged as against the illegality of such a marriage. If the law will presume the termination of the former marriage relation by the death of one of the parties to it, why not indulge any other presumption which might legally terminate that relation? We think, where the facts are not such as to destroy such a presumption, that a dissolution of the first marriage, by divorce, will be presumed in favor of the validity of the second marriage.

In the case of *Klein v. Laudman*, 29 Mo. 259, the plaintiffs brought suit for slander. They proved their marriage, but the defendant proved declarations of the wife that she had married, in Germany, to another man. The court says, in that case: "There was no presumption that a marriage, which was proved to have existed at one time in Germany, continued to exist here after positive proof of a second marriage *de facto* here. The presumption of law is, that the conduct of parties is in conformity to law, until the contrary is shown. That a fact, continuous in its nature, will be presumed to continue after its existence is once shown, is a presumption which ought not to be allowed to overthrow another presumption, of equal if not greater force, in favor of innocence. \* \* There was not any evidence that the first husband of Mrs. Klein was still living; but if this had been established, we think she was still entitled to the benefit of the favorable presumption that the first marriage had been dissolved by a divorce."

Mr. Bishop, in his valuable work on marriage and divorce, vol. 1, section 457, uses this language: "Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and

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*Boulden et al. v. McIntire.*

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whatever the form of the proofs, the law raises a strong presumption of its legality ; not only casting the burden of the proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption, that it is illegal and void. So that it can not be tried like ordinary questions of fact, which are independent of this sort of presumption."

In this case, Eliza Street intermarried with Charles Limes, in Fayette county, in the State of Ohio, in December, 1873. She and her husband separated within a few weeks after the marriage, never having kept house. She removed to Indiana soon after the separation, and on the 22d day of April, 1879, under her maiden name of Eliza Street, was in due form of law married to Horace G. Boulden. She lived with him as his wife until his death, which occurred in the year 1881. She subsequently intermarried with one Abijah Stewart, and died some time before the trial of this cause. It will thus be seen that she had been living separate and apart from Limes for a space of between five and six years before she married Boulden. In the absence of proof to the contrary, it would undoubtedly be presumed, in favor of the validity of her marriage with Boulden, that Limes was dead. In the absence of any showing to the contrary, what reason can be assigned, under the circumstances, for not presuming that the marriage relation between her and Limes had been dissolved by a legal divorce before her last marriage ?

It is urged that to require the appellants to prove that Eliza Street had not been divorced from Charles Limes prior to the date of her marriage with Boulden would be requiring them to prove a negative.

As we have seen from the authorities above cited, the law requires the party who asserts the illegality of a marriage to take the burden of that issue and prove it, though it may involve the proving of a negative.

The practice of requiring a party to prove a negative is

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not new in Indiana. The case of *Goodwin v. Smith*, 72 Ind. 113, was an application by Goodwin to obtain a license to retail intoxicating liquor. It was held in that case that the petitioner was required to prove that he was not in the habit of becoming intoxicated, though such requirement involved the proving of a negative. In that case ELLIOTT, J., who wrote the opinion, collected the authorities upon this subject, from which it appears that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative. *Smith v. Zent*, 59 Ind. 362; *Carey v. Sheets*, 67 Ind. 375; *Cummings v. Parks*, 2 Ind. 148; 2 Greenleaf Ev., section 454; *Smith v. Bettger*, 68 Ind. 254. Many illustrations of the rule are found in these authorities, but we do not deem it necessary to lengthen this opinion by setting them out.

The right of the appellant to the land in dispute rests upon the supposed illegality of the marriage between Eliza Street and Horace G. Boulden, and in our opinion, before they can make good that right they must, by proper proof, remove every presumption of the legality of such marriage.

There appears in the record a transcript from the common pleas court in the State of Ohio from which it appears that Charles Limes obtained a divorce from Eliza Limes on the 26th day of May, 1883. The land in dispute was conveyed by Eliza Boulden to Samuel Traver on the 17th day of December, 1881, and we are at a loss to know upon what ground this record was admitted in evidence against appellee in this cause. The parties could neither say nor do anything that could affect the title to this land after the execution of the deed. It may well be doubted as to whether this record, if admissible in evidence under the circumstances in this case, tended to prove that Eliza had not previously obtained a divorce from Charles Limes in the courts of Indiana; at least it is not conclusive upon that question. It is shown that she had resided in this State many years prior to the date at which the divorce was granted to Charles Limes in Ohio,



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and was a resident of this State at the time, residing in Clinton county as the wife of Abijah Stewart. Our conclusion is, that the jury were authorized to find that there was not sufficient evidence in this cause to remove the presumption in favor of the legality of the marriage between Eliza Street and Horace G. Boulden, and that the evidence in the cause tends to support their verdict. In this conclusion we do not desire to be understood as fixing what would be the rule in cases of prosecutions for bigamy, where the defendant was living and presumed to be possessed of the evidence establishing the granting a divorce. There may be, and perhaps is, a distinction between that class of cases and the one at bar, where the party alleged to have been guilty of bigamy is dead and the contest is over the property.

We find no error in the record for which the decree of the circuit court should be reversed.

Judgment affirmed.

MITCHELL, J., dissents.

Filed May 11, 1889; petition for a rehearing overruled Sept. 25, 1889.

No. 13,906.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. LUCAS.

**SPECIAL VERDICT.**—*Formal Statements.*—*Omission of.*—Where the facts are properly stated, the omission of mere formal statements, or the usual formal conclusion, will not vitiate a special verdict.

**RAILROAD.**—*Duty to Passengers.*—*Must Provide Safe Alighting Places.*—It is the duty of a carrier of passengers to provide and maintain safe alighting places, and for a negligent breach of this duty it is liable to a passenger who sustains injury without his fault.

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128	418
119	583
132	530
119	583
134	400
134	611
119	583
142	482
143	131
143	697
119	583
146	396
146	645
119	583
149	135
152	670
119	583
157	420
119	583
158	67
119	583
163	384
119	583
164	423
119	583
c171	168
171	170

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**SAME.—Platforms and Stations.—Lights.**—A railroad company is bound to keep the platforms at its stations in a safe condition, and if passengers are discharged after dark it must provide lights.

**SAME.—Defective Platform.—Injury to Passenger.—Concurring Negligence of Third Party.**—Where a railroad company discharges a passenger in the night-time at the crossing of another railroad, where the stations of the two companies are connected by an unlighted platform, so constructed as to lead the passenger to believe that it is designed for the use of travellers in passing from one station to the other, and the passenger, in going from the station where he alighted to the other station, and exercising care, falls through an unguarded hole in the platform and is injured, the carrier is liable, although the negligence of the other company concurred in causing the injury.

**SAME.—Proximate Cause.**—If an injury results from a negligent act of a defendant, such act will be deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care.

**EVIDENCE.—Medical Witness.—Opinion as to Probable Results of Personal Injury.**—It is competent to ask a medical witness, either on direct or cross-examination, to give his opinion as to the probable results of an injury to the person.

From the Porter Circuit Court.

*G. W. Friedley, C. C. Matson and G. R. Eldridge, for appellant.*

*H. A. Gillett and E. D. Crumpacker, for appellee.*

**ELLIOTT, C. J.**—The appellee in her complaint charges the appellant and the Pennsylvania Company with negligence in suffering a platform adjoining their stations at Watah to become unsafe, and avers that, without fault on her part, she fell through a hole in the platform and was severely and permanently injured. The Pennsylvania Company was awarded judgment on the special verdict, and the appellant alone prosecutes this appeal. No objections have been urged to the complaint in argument, and we do not, therefore, give a synopsis of it.

The special verdict is not ill, although it does not contain the usual formal conclusion. Where the facts are properly stated, the omission of mere formal statements will not vitiate a special verdict.

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The Louisville, New Albany and Chicago Railway Company v. Lucas.

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The special verdict reads thus :

“ We, the jury, having been required to find a special verdict in this action, do find the facts in the case to be as follows : That said defendants are respectively railroad corporations of and in the State of Indiana, and were such at the time of the injury hereinafter mentioned ; that at the time of such injury, and for several years prior thereto, the said defendants were respectively controlling and operating railroads, the road of said Pennsylvania Company running through the State of Indiana from east to west, and through the counties of Laporte and Porter in said State, and the one of said defendant Louisville, New Albany and Chicago Railway Company running through said State from north to south, and through said county of Laporte ; that said railroads at the time of such injury, and for twenty-five years prior thereto had, crossed each other at grade and nearly at right angles, at the village of Wanatah, in said county of Laporte ; that those in control of said respective railroads had, during all said twenty-five years, solicited and invited an interchange of freight and passenger traffic at said point of crossing, and at the time of such injury said defendants were doing, and for five years prior thereto had been doing, a large business in the way of interchange of freight and passengers at said point, each maintaining a regular station, with passenger, ticket and freight offices, at said point, and transferring freight and the baggage of passengers from one to the other ; that the said defendant Louisville, New Albany and Chicago Railway Company, to the north of said crossing had a main track and one side-track east of and immediately adjoining the same, and about ten feet east of said side-track had a building thirty-six feet long, the north half of which was used and occupied by said company as a passenger waiting-room, and ticket and telegraph office, and the south half thereof as a freight-room ; and in front of such building, and extending to the said side-track, a platform at an elevation of about one foot from the grade of its

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The Louisville, New Albany and Chicago Railway Company v. Lucas.

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tracks, which building was forty-seven feet north of such crossing; that said defendant, the Pennsylvania Company, to the east of said crossing had one main track and a side-track north of and immediately adjoining the same, and about ten feet north of said side-track a freight-house forty-one feet long, and in front of such freight-house and extending to said side-track, a platform at an elevation of about three feet from the grade of its tracks, without any steps leading down therefrom to the ground, which freight-house was forty-one feet east of said crossing; that said defendant Pennsylvania Company had a passenger ticket office on the south side of its main track, about one hundred and seventy-five feet east of such crossing, with a gravel walk on the grade of its track extending from a little east of said ticket office nearly to the crossing, along which walk it received and discharged its passengers; that there was a platform about twenty feet wide extending from the said Pennsylvania Company's freight-house, and connected with and joining on to the said platform in front thereof, and so extending thence westward along and abutting on said side-track to a point where it joined and connected with a like platform, about ten feet wide, extending southward from said platform in front of said passenger and freight-house of the defendant Louisville, New Albany and Chicago Railway Company, and so joining and connecting at the angle formed by said crossing; that such platforms, and the respective extensions thereof aforesaid to such junctions thereof, were under the charge and control of the respective defendants on whose tracks they abutted as aforesaid, and were used by both said defendants for the entire length thereof for their joint use and convenience for the transfer of freight and baggage by one to the other respectively; that said platforms were so constructed and joined together as aforesaid as to form, and they did form, one continuous passage-way, without interruption or any visible hindrance to the use thereof by passengers, and were so constructed and joined together as to

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lead one unfamiliar with the locality to suppose that they were intended for the use and convenience of passengers in going to and from the said station-house of the defendant Louisville, New Albany and Chicago Railway Company to that of the other defendant, and so as naturally to invite such use.

“There was, however, a way of going from said station of the Louisville, New Albany and Chicago Railway Company to the other, consisting of a plank walk about five feet wide, on a grade with their tracks, and leading from said elevated platform across said side-track and thence southward between the main and side-tracks to a point about 15 feet north of the main track of the Pennsylvania Company, and thence southeastwardly diagonally across such last mentioned track, to the south side thereof, and connecting there with the aforesaid gravel walk, which last mentioned route and way was the one ordinarily used by passengers. That the foregoing, so far as therein stated, represents the situation, condition, use and control of all the premises in question at the time of the injury hereinafter mentioned, and for five years prior thereto.

“At the time, however, of such injury, the said platform, so extending from said Pennsylvania Company’s freight-house to such junction and connection, was old, decayed and greatly dilapidated and out of repair, and about 15 feet east of such junction there was a hole in said last mentioned platform, caused by the breakage of planks therein, of the size and for the space of three to five feet either way, which hole was then, and had been, and remained, open and wholly unguarded for the period of four months prior to such injury, and the existence thereof, as well as such general condition of such platform, was, during all said time, well known to both the defendants; that there was, during all said time, a ditch running under said platform and immediately under said hole and open space, and the distance from the top of such platform to the bottom of such ditch was seven and

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one-half feet ; that, on the 12th day of November, 1885, the plaintiff in this cause was a passenger for hire, on one of the regular passenger trains of the defendant Louisville, New Albany and Chicago Railway Company, from the south, destined for Wanatah aforesaid, and intending there to take a train on said Pennsylvania Company's road ; that such train on which plaintiff was so travelling arrived at and stopped in front of the said passenger-house of said Louisville, New Albany and Chicago Railway Company, at Wanatah aforesaid, at 6 : 30 P. M. of that day ; that it was then after nightfall, dark and raining ; that she alighted from said train, and the train immediately moved on and away ; that said platform was wholly unlighted, and there was no light visible in or about said passenger-house or the platform, or the tracks in front thereof, nor any person in attendance thereon or present thereabouts ; that plaintiff was wholly unfamiliar with said premises, only knowing the general direction from one station to the other ; that she so alighted between said tracks, and discerning the outlines of said elevated platform in front of such passenger-house, she stepped at once to and upon the same, and from there looking around she did not, and by reason of the darkness could not, discover such walk between the tracks, nor any entrance to such station-building, but could and did discover the said elevated platform, extending southward in the direction of the other road ; that she had no notice or knowledge of the existence of such walk between the tracks of the Louisville, New Albany and Chicago Railway Company ; that she looked, and after looking about did not nor could she see or hear any person about the premises, and there were no lights visible, except in the distance and upon or beyond the said Pennsylvania Company's railroad ; that there was barely sufficient light to enable a person to see the general outlines of said buildings and platforms ; that said plaintiff knew of no other way, and supposing and believing that the said platform, so extending south, was the way, and the only way,

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from said station at which she alighted to the other, she carefully walked along the same southwardly to such junction, and turned thence eastward on said Pennsylvania Company's platform, still supposing and believing as aforesaid, and without any notice or knowledge of any defect or imperfection in said platform, and unable, on account of the darkness, to discern any defect or imperfection therein, and so walking on carefully and at a moderate gait, she, suddenly and without notice or warning, stepped into and fell through the hole aforesaid, to the bottom of said ditch, and by reason of such fall she suffered severe and permanent physical injuries, whereby she was and is damaged in the sum of \$4,500; that, during all the time from her alighting from such train to the occurrence of such fall and injury, the plaintiff was exercising such care, caution and prudence as persons of ordinary prudence would and do exercise under like circumstances. Now, if, upon the facts aforesaid, plaintiff is entitled to recover against the defendants, or either of them, then we find for the plaintiff, and assess her damages at \$4,500."

The plaintiff, as a passenger of the appellant, was entitled to demand that the station's approaches and accessories used by it should be kept in a safe condition. A carrier of passengers is under a duty to provide and maintain safe alighting places, and for a breach of this duty must respond in damages to a passenger who, without contributory fault on his part, is injured by a negligent failure to perform this duty. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. Rep. 168); *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26; *Longmore v. Great Western R. W. Co.*, 19 C. B. N. S. 183; *Burgess v. Great Western R. W. Co.*, 6 C. B. N. S. 923; *Clusman v. Long Island R. W. Co.*, 73 N. Y. 606; *McDonald v. Chicago, etc., R. R. Co.*, 26 Iowa, 124; *McKone v. Michigan, etc., R. R. Co.*, 51 Mich. 601 (47 Am. Rep. 596). Where passengers are discharged after dark it is the duty of the railroad company to light its stations and platforms. *Moses v. Louisville, etc., R. R. Co.*, 39 La. Ann. 649 (4



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Am. St. Rep. 231) ; *Stewart v. International, etc., R. R. Co.*, 53 Tex. 289 (2 Am. and Eng. R. R. Cases, 497) ; *Forsyth v. Boston, etc., R. R. Co.*, 103 Mass. 510 ; *Beard v. Connecticut, etc., R. R. Co.*, 48 Vt. 101 ; *Buenemann v. St. Paul, etc., R. W. Co.*, 32 Minn. 390 (18 Am. and Eng. R. R. Cases, 153) ; *Quaife v. Chicago, etc., R. W. Co.*, 48 Wis. 513 ; *Gaynor v. Old Colony, etc., R. W. Co.*, 100 Mass. 208.

The duty of a railway carrier does not end when it provides safe cars, engines and appliances, for its duty extends so far as to require it to provide means for passengers to safely enter its cars at its stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations. After the passenger has left the cars and stations of a railway carrier its duty as a carrier ceases, but not until then. *Cincinnati, etc., R. R. Co. v. Carper, supra*.

It was the duty of the appellant to keep the platform which it used in conjunction with the Pennsylvania Company in a safe condition. The situation of the platform, and the manner of its construction, were such as to make it the duty of the appellant to see that it was safe, for it was bound to know that if it became unsafe the lives and limbs of its passengers were put in peril. A railroad company may not be bound to foresee and provide against accidents that no one could by the highest degree of practicable care anticipate, but it is bound to use the highest degree of practicable care to provide against accidents to passengers that may be foreseen and prevented. *Louisville, etc., R. R. Co. v. Wood*, 113 Ind. 544 ; *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404 ; *Terre Haute, etc., R. R. Co. v. Buck, supra* ; *Binford v. Johnston*, 82 Ind. 426 ; *Louisville, etc., R. R. Co. v. Schmidt*, 81 Ind. 264 ; *City of Crawfordsville v. Smith*, 79 Ind. 308 ; *Wagner v. Goldsmith*, 78 Ind. 517 ; *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166. The negligence of the appellant in leaving a platform, constructed as was the one described in the verdict, in a dangerous condition, without lights or guards, might have been expected to bring upon a passenger just such



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an injury as the plaintiff actually received, and the appellant was in fault for not foreseeing and guarding against what did occur. The consequences which resulted were the natural consequences of the appellant's breach of duty, and it must answer to the injured person. *Blythe v. Birmingham Waterworks Co.*, 11 Exch. 781; *Hoag v. Lake Shore, etc., R. R. Co.*, 85 Pa. St. 293; *Smith v. London, etc., R. W. Co.*, L. R. 6 C. P. 14; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179. It is not necessary that precisely such an accident as actually occurred might be anticipated, for there is liability if it was probable that some injury might result from a negligent breach of duty.

We have disposed of the argument of the appellant which asserts that the negligence attributed to it was not the proximate cause of the appellee's injury in what we have said, for, as the authorities all declare, if the injury resulted from the negligent act of the defendant, that act will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. The authorities we have cited declare the doctrine we have stated, as do those which follow, and many others. *Bishop Non-Contract Law*, sections 46, 457; *Wharton Negligence* (2d ed.), section 77.

If it were granted that the negligence of the Pennsylvania Company concurred with that of the appellant in causing the appellee's injury, it would not exculpate the latter. It is not legally possible that one negligent person may escape liability because the negligence of another concurred in producing the injury. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Slater v. Mersereau*, 64 N. Y. 138; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628; 2 Thompson Neg., 1088; *Bish. Non-Contract Law*, section 572. The question here is not as to the rights of the appellant against the Pennsylvania Company, but the question is, what are the rights of a passenger whom the appellant had undertaken to carry safely?

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The duty which rested upon the appellant we have already defined, and it only remains to add that there is a right of action although the Pennsylvania Company may also have been guilty of culpable negligence.

The special verdict very satisfactorily shows that the appellee was not guilty of contributory negligence. She had a right, within reasonable limits, to rely upon the presumption that the company had done its duty and that the platform was safe. *Nave v. Flack*, 90 Ind. 205, 208; Bishop Non-Contract Law, section 532. She did all that the most prudent person could well have done under the circumstances, and this was all that the law requires. She had a right, in the situation in which she was placed by the appellant, to proceed, using care and caution, as she did, and the injury which she received is attributable solely to the culpable fault of the railroad companies. *Terre Haute, etc., R. R. Co. v. Buck, supra*. "In considering whether or not passengers are in fault, it may be taken into account that they are justly entitled to presume that the duty" of making stations, approaches and surroundings safe has been performed. Bishop Non-Contract Law, section 1086.

On cross-examination one of the medical witnesses was asked: "Whether the present debilitated condition of the plaintiff might not be produced, either directly or indirectly, by the fall she received?" And another was asked: "What might be the result of a dislocation of the kidneys?" And the appellant's counsel assert that the trial court erred in permitting the questions to be asked. In our judgment counsel are clearly in error. It is competent to ask a medical witness his opinion as to the probable results of an injury to the person, on direct examination, and it is certainly competent to ask such a question on cross-examination, where one of the chief objects is to test the skill and professional knowledge of the witness. *Goodwin v. State*, 96 Ind. 550; *Wabash R. W. Co. v. Savage*, 110 Ind. 156; *Louisville,*

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*etc.*, *R. W. Co. v. Falvey*, 104 Ind. 409; *Louisville, etc.*, *R. W. Co. v. Wood*, 113 Ind. 544, 558.

We can not hold that the damages assessed are excessive, for there is abundant evidence that the appellee was very severely injured and that her injuries are of a permanent nature.

Judgment affirmed.

Filed June 18, 1889; petition for a rehearing overruled Sept. 19, 1889.

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No. 13,928.

## CORYA v. CORYA.

**ADMINISTRATOR.**—*Deposit of Trust Funds in Individual Name.*—*Liability for Loss.*—Where an administrator deposits trust funds in a bank in his individual name and takes a certificate of deposit payable to his own order, any loss which occurs by reason of the failure of the bank is his loss, and he is bound to account to the persons entitled for the full amount deposited.

**WILL.**—*Special Bequest.*—*Cost of Administration.*—Where a testator bequeaths the proceeds of a promissory note to certain named legatees, and follows this with a general bequest of all his other property to another person, no part of the specific bequest is liable for the costs of administration, if the property disposed of generally is sufficient for that purpose.

From the Jennings Circuit Court.

*G. F. Lawrence*, for appellant.

*W. New*, for appellee.

OLDS J.—Elizabeth R. Woodfill died testate on the 26th day of September, 1884, disposing of her entire estate

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by items one and two of her will, which items are as follows:

“Item 1. I will and bequeath to my granddaughters, Alice Woodfill and Lizzie Woodfill, when they become of lawful age, to have the proceeds of a note that I now hold against Trevarion Tobias and Francis W. Tobias, for four hundred dollars, dated November 1, 1883, due in twenty-four months from date, with six per cent. interest until paid, and that some responsible person take possession of said note and collect the same when due, and deposit the money in the Jennings County Bank, at North Vernon, Indiana, to be given to said Alice Woodfill, one-half of said note when she is eighteen years old, and one-half to Lizzie Woodfill when she is eighteen years old.

“Item 2d. I give and bequeath to my daughter, Delia Corya, all of my property, moneys and effects, of whatever kind, to have and to hold forever, except as provided in Item 1.”

Said will was admitted to probate, and Enoch G. Corya was appointed administrator, with the will annexed, on the 29th day of December, 1884. The uncontroverted facts show that at the time of the appointment of Enoch G. Corya as administrator the appellant, Susie Corya, was the duly appointed and acting guardian of Alice and Lizzie Woodfill; that prior to the death of the testatrix she had received \$250 on the note bequeathed to said Alice and Lizzie, and placed it and the note with the will; within a few days after the death of the testatrix, one Benjamin F. Byfield, one of the subscribing witnesses to the will, took the will and the \$250 paid upon the note and deposited the money and the will with the clerk of the Jennings Circuit Court. Afterwards, on the 3d day of November, 1884, Enoch G. Corya collected the balance due upon the note, \$165.25, and deposited the same with the clerk of said court. After Enoch G. Corya had been appointed administrator he received the money from the clerk, \$415.25, and deposited the same in the Jen-

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Corya v. Corya.

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nings County Bank, at North Vernon, Indiana, on the 31st day of December, 1884, in his own name, taking a certificate of deposit therefor, payable to his own order. The Jennings County Bank was a private bank, owned and conducted by one Charles E. Cook. On the 14th day of September, 1885, Cook, the banker, failed, and made an assignment. Afterwards Cook compromised with his creditors, including Enoch G. Corya, for fifty cents on the dollar, and paid to said Enoch G. Corya, in full of said certificate, \$207.63. The testatrix died the owner of a farm worth \$3,000, or more, and a small amount of personal property, and was owing no debts. The administrator made no inventory of the estate. The administrator filed his report showing the receipt of the money by him from the clerk, the depositing of it in the bank, the failure of the bank, the compromise and receipt of \$207.63 in full of his certificate, and the payment of one half of the cost of administration, amounting to \$29.42, out of said \$207.63, and paid the balance into court for Susie Corya, guardian of Alice and Lizzie Woodfill, and asked to have his report approved and that he be discharged.

Susie Corya, guardian, appeared and filed proper exceptions to the report, setting forth the facts as hereinbefore set out, and objected to the approval and confirmation of said report. There was a hearing by the court, and the exceptions were overruled and the report approved. A motion for a new trial, by appellant, properly presenting the questions, was filed, and overruled, and exceptions. This appeal is prosecuted, and errors properly assigned in this court.

The questions presented are as to the liability of the administrator for the full amount of the money received belonging to Alice and Lizzie Woodfill, and as to whether such funds are liable for the payment of any portion of the costs of administration.

It is not contended by the appellee but that the legatees Alice and Lizzie Woodfill were entitled to all of the pro-

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ceeds of the note, including the amount paid before the death of the testatrix.

In the case of *Naltner v. Dolan*, 108 Ind. 500, it is held, that whenever a trustee puts funds in such shape as to invest himself with the legal title to them, or if deposited in a bank in such manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assigns or legal representatives, to claim it as the fund of the depositor, the *cestui que trust* has a right to treat the same as the funds of the trustee, and recover the same of the trustee, and in such case if loss occurs it is the loss of the depositor. *Fletcher v. Sharpe*, 108 Ind. 276.

These authorities are decisive of the question in this case. Enoch G. Corya, administrator, deposited the money to his own credit, payable to his own order. There was a liability created on the part of the bank in favor of Corya. The loss sustained was the loss of Corya, the depositor, and he is liable as administrator to account for the full amount of the money he received belonging to said legatees.

Next it is proper to consider the question whether the bequest to Alice and Lizzie Woodfill was subject to be used by the administrator for the payment of costs of administration. We think it was not. The testatrix made a specific bequest of the proceeds of the note to these two legatees, and followed such bequest with a devise of all the remainder of her estate to her daughter, Delia Corya. The bequest to her daughter Delia is general, and she treats her personal and real estate as forming one whole, without distinguishing between them. Woerner on the American Law of Administration, vol. 2, at page 986, says: "It is also presumed that, by singling out a specific article by way of a specific bequest, the testator intends that the legatee shall take in preference to those legatees whose bequests are not specifically pointed out; hence the rule is, that specific legacies do not abate, except in favor of such legacies as were given for a valuable consideration, or among themselves."

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Pouder *et al.* v. Ritzinger *et al.*

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Williams on Executors, pages 1473 and 1474, states the rule to be as follows: "That as long as any of the assets, not specifically bequeathed, remain, such as are specifically bequeathed are not to be applied in payment of debts; although to the complete disappointment of the general legacies."

We think the costs of administration should have been paid out of the estate not specifically bequeathed to said Alice and Lizzie Woodfill, and which was disposed of and given to Delia Corya by the residuary clause in the will. See 2 Woerner Am. Law of Adm., p. 989.

The court erred in overruling the exceptions of the appellant to the report, and in overruling appellant's motion for a new trial.

Judgment reversed, at costs of appellee, with instructions to the court below to proceed in accordance with this opinion.

BERKSHIRE, J., took no part in the decision of this case.

Filed June 27, 1889; petition for a rehearing overruled Sept. 25, 1889.

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No. 13,566.

POUDER ET AL. v. RITZINGER ET AL.

119 597  
130 348

**MORTGAGE.—Release.—When Lien Continues.—Married Woman.—Inchoate Interest.—Judicial Sale.**—Where a mortgagee, in order to enable a mortgagor to renew a first mortgage held by a third person and give it its proper priority as a lien, cancels his mortgage and takes a new one to secure the same notes, he does not thereby release the lien created by his original mortgage, and the intervention of the act of March 11th, 1875, vesting the inchoate interests of married women upon judicial sales of their husbands' property, does not affect his rights.

From the Marion Superior Court.

W. D. Bynum and A. T. Beck, for appellants.

B. Harrison, W. H. H. Miller, J. B. Elam, F. Winter, F. Knefler and J. S. Berryhill, for appellees.

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*Pouder et al. v. Ritzinger et al.*

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COFFEY, J.—This cause is here for the second time. *Pouder v. Ritzinger*, 102 Ind. 571.

The facts in the case are, that in 1871 the appellant Milton Pouder and one Jordan owned adjoining tracts of land and mortgaged them, jointly, to Brock to secure \$8,000, \$4,000 for each. In this mortgage the appellant Mrs. Pouder joined.

In May, 1875, Milton Pouder mortgaged his said tract of land to Tate to secure borrowed money, in which mortgage his wife did not join. When Pouder's mortgage to Brock became due he was unable to pay his part of it, and by agreement between him, Brock and Tate it was cancelled, and Pouder and wife gave Brock a new mortgage for \$4,000 upon said land. At the same time Tate, in order to give the new mortgage to Brock the same priority held by the old one, cancelled his mortgage and took a new one from Pouder, for the same amount and on the same property covered by the old one. In this new mortgage Mrs. Pouder did not join. The substitution of the mortgages occurred on the 12th day of February, 1876.

Tate's notes and mortgage not having been paid when due, he foreclosed his mortgage, sold the property at sheriff's sale, and he and his wife bid the same in and took a sheriff's certificate of sale, showing a sale to them of Milton Pouder's interest in the property. Brock assigned his mortgage to the appellee Ritzinger, who commenced this action to foreclose the Brock mortgage, making parties thereto Tate and his wife and the appellants Pouder and Pouder. Mrs. Pouder filed a cross-complaint, in which she claimed a decree that the undivided two-thirds of the mortgaged premises should be first sold to satisfy the mortgage debt, and if the proceeds of said two-thirds should be sufficient to pay said debt and costs, that the undivided one-third should be exempt from sale.

Tate and wife answered the cross-complaint, averring the facts above set forth, and alleging that the new mortgages



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*Pouder et al. v. Ritzinger et al.*

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were only continuations and extensions of the same securities for the same debts mentioned in the first mortgages, and claiming that the decree of foreclosure ought to require the sale of the entire premises at once, if necessary.

A demurrer to this answer was sustained, on account of which the cause was reversed for the reasons stated in the opinion in this cause above cited.

After the cause was remanded, an issue was formed on this answer and a trial had, resulting in a finding and decree in favor of the appellants, but upon appeal to the general term the finding and decree were reversed, upon the ground that it was not sustained by the evidence.

The error assigned here is, that the Superior Court in general term erred in reversing the decree entered in special term. The evidence in the cause is of such a character as to leave no doubt that the sole object in releasing the mortgage executed by the appellant Milton Pouder to Tate, in 1875, was to enable Brock to retain the priority he had before such release. No part of Tate's debt was paid, and the new mortgage secures the same notes secured by the old one. The old mortgage was released solely as an accommodation to Milton Pouder. On the same day that the substitution of these mortgages took place, Warren Tate and Milton Pouder entered into the following agreement:

"Now, as supplemental to the above and foregoing agreement, at the special instance and request of said Milton Pouder, and to accommodate him, the following additional agreement is now made:

"*First.* Said Pouder agrees to have a certain mortgage on said realty, which is senior in date to the one by him given to Tate, fully satisfied of record.

"*Second.* Said Tate then agrees to enter satisfaction of his mortgage on the record.

"*Third.* Then Pouder is to place a mortgage on said realty of four thousand dollars, to enable him to procure a loan for that sum.

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Faurote et al. v. The State, ex rel. Black.

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“*Fourth.* Then Pouder is to execute a new mortgage to Tate, on the said realty, to secure the payment of the same notes mentioned in the agreement to which this is a supplement.

“This change of security is in nowise to affect the original agreement, it being hereby admitted that said notes by Pouder to Tate have not been paid.”

From this agreement, under the authorities cited in this case when here on a former occasion, the transaction did not release the lien created by the original mortgage executed by Pouder to Tate. That mortgage, as we have seen, was executed on the — day of May, 1875, while the act of March 11th, 1875, conferring on married women the right to one-third of the husband's land sold on executions or decrees, in which her inchoate interest was not ordered barred or foreclosed, did not take effect until August 24th, 1875.

It follows that Mrs. Pouder takes no interest in the land in controversy, unless she survives her husband, and that the Superior Court, in general term, did not err in reversing the decree in said cause entered in special term.

There is no error in the record for which the ruling of the court below should be reversed.

Judgment affirmed.

Filed March 26, 1889; petition for a rehearing overruled September 17, 1889.

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No. 12,439.

FAUROTE ET AL. v. THE STATE, EX REL. BLACK.

From the Henry Circuit Court.

J. A. New and J. W. Jones, for appellants.

D. S. Morgan, for appellee.

OLDS, J.—This is one of a series of cases appealed to this court from the Henry Circuit Court, and it is conceded that the record presents the same questions as were presented in the other cases, and which were decided by this court in the case of *Faurote v. State, ex rel.*, 110 Ind. 463.

For the reasons given in that case the judgment in this case is reversed, with costs.

Filed May 29, 1889.

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**Held**, that, no matter how long a delinquency continues, the highest fine assessable is fifteen cents per week for failing to pay dues, and ten cents per month for failing to pay interest.

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stated in the bill of lading, the law implies as a part of the contract that the carrier shall have a reasonable compensation, such as is commonly or customarily charged others for like services under like conditions, and evidence of a previous oral contract fixing the charge is not admissible. *Ib.*

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2. *Same.*—*Practical Exposition Merely Establishes a General Principle.*—Practical exposition does not give rights in particular cases; it merely establishes a general principle. *Ib.*
3. *Legislative Power.*—*Enactment of Laws.*—The authority of the Legislature in the enactment of laws is subject to no restrictions except such as are imposed by the Constitution of the State, the Constitution of the United States, and the laws and treaties made in pursuance thereof. *Hovey v. State, ex rel. Carson, 395*
4. *Same.*—*Statute.*—*Construction of.*—A statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of the enactment. *Ib.*
5. *Same.*—*Appointment to Office.*—*Power.*—*Executive Department.*—While the appointment to office is in its nature an executive act, the exclusive right to exercise the power of appointment is not included in the general grant of power to the executive department. *Ib.*
6. *Same.*—*Power of Appointment.*—*By whom May be Exercised.*—The general power to choose, elect or appoint officers is not inherent in the executive or any other branch of the government, but is a prerogative of the people, to be exercised by them or by those departments of the government to which it has been either expressly or by necessary implication confided or reserved in the Constitution, and neither the people nor those to whom the power has been confided can exercise such power except in conformity with the Constitution and the laws enacted in pursuance thereof. *Ib.*
7. *Same.*—*Law Enjoined by Constitution.*—*Force of.*—A law enacted in obedience to and in execution of the express command of the Constitution, which is not in palpable violation of some express constitutional provision, is of as high sanction as though it were found in that instrument. *Ib.*
8. *Same.*—*Hospital for Insane.*—*Legislature May Appoint Officers of.*—As the Constitution enjoins upon the Legislature the duty to make provision by law for the support and maintenance of an institution for the treatment of the insane, this is equivalent to an express grant of authority to provide for the selection of all such agents or officers as that body may deem necessary to accomplish the duty imposed, and it may

either appoint such officers or agents itself or commit the power to do so to the Governor. *Ib.*

9. *Same.—Settled Construction of Provision.—Readoption in New Constitution.—Effect of.*—Where a constitutional provision has received a settled judicial construction, or a uniform legislative exposition, which has been acquiesced in by the other departments and the people, and such provision is afterwards incorporated in a new Constitution, it will be presumed that it was adopted with knowledge of the construction it had previously received, and the courts will adhere to such construction. *Ib.*
10. *Same.—Power of Appointment.—Practical Construction of Constitution.*—As the Legislature, with the acquiescence of the people and the other departments, uniformly construed the similar provisions of the old Constitution and of the new to confer upon it the power to appoint the trustees for the State hospital for the insane, that construction is now conclusive, and can not be questioned. *Ib.*
11. *Same.—Authentication of Act.—Absence of Governor's Signature.—Presumption.*—Where an act, which does not have the signature of the Governor, is certified by the legal custodian, and is properly authenticated and complete in form, judicial investigation is at an end, the conclusive presumption being that the act became a law in some constitutional method, without the approval, or notwithstanding the disapproval, of the Governor. *Ib.*
12. *Same.—Extraneous Facts not Admissible.*—The validity or proper authentication of an act can not be brought in question by instituting an inquiry of fact into matters extraneous to the act itself. *Ib.*

#### CONTEMPT.

See WITNESS, 2.

#### CONTEST OF WILL.

See WILL, 8, 11 to 13.

#### CONTRACT.

See BANKS AND BANKING, 4; COMMON CARRIER; CORPORATION; HUSBAND AND WIFE, 2; MARRIED WOMAN; PROMISSORY NOTE, 2 to 6; RAILROAD, 4, 6, 7; REAL ESTATE, 9.

1. *Merger of Previous Negotiations.*—Where a written contract is executed, all previous negotiations and understandings are merged in the writing, and parol evidence is not admissible to vary or control its legal effect. *Hostetter v. Auman, 7*
2. *Written Contract of Sale.—Conversion.—Evidence.*—Where a writing, signed by A., evidences a sale of timber by him to B. and states the consideration and its payment, the title thereby passes to B., and in an action by him against C. for the conversion of the timber it is not competent to prove by A. that he understood the writing to be a receipt, and that he supposed he was selling the timber to C., with whom he had previously negotiated its sale by parol, B. merely paying the purchase price for the latter. *Ib.*
3. *Same.—Previous Parol Contract of Sale.*—In such case C. will not be allowed to testify as to previous negotiations between himself and A., resulting in a parol contract for the purchase of the timber, nor as to an agreement between himself and B. whereby the latter was to pay the purchase-price for C., who was to work the timber into staves, repay B. the sum advanced, after which they were to divide the profits equally. *Ib.*
4. *Same.—Contract for the Sale of Growing Timber.—Statute of Frauds.—Instructions.*—A contract for the sale of growing timber is a contract

for the sale of an interest in land, and must be in writing in order to bind either party. For instructions upon this subject, the refusal to give which is held to be error, see opinion. *Ib.*

5. *Recognizance.—Agreement of Third Person to Indemnify Surety.—Statute of Frauds.*—A contract whereby A. agrees with B. that in consideration that the latter will enter into a recognizance, as surety, for the appearance of C. to answer a criminal charge, A. will indemnify B. for any loss he may sustain, is not within the statute of frauds, as an agreement to answer for the default of another, but is valid as an original agreement. *Keesling v. Frazier, 185*
6. *Same.—Measure of Recovery.*—Under such contract B. is entitled to full indemnity, and a judgment against A. for the amount of the recognizance and the costs made in taking judgment thereon, with six per cent. interest from the date of the payment of the same by B., is proper. *Ib.*
7. *For Care and Support.—Specific Performance.*—A contract for care and support is not one the specific performance of which will be enforced, but if repudiated the remedy is an action for damages. *Lindsay v. Glass, 301*
8. *Same.—Transfer of Property.—Condition Subsequent.*—While such a contract remains executory, a transfer of property thereunder will be treated as having been made upon the condition subsequent that the promise to furnish care and support shall be fully and fairly performed. *Ib.*
9. *Same.—Rescission.—Reclamation of Property.*—Until the contract is fully performed on both sides, it is liable to be rescinded and the property transferred thereunder reclaimed, leaving the parties to their redress for what may have been furnished. *Ib.*
10. *Same.—Contract for Support Imposes Personal Obligation.*—A transfer of property in consideration of an agreement to furnish the grantor a home, with care and support, imposes a personal obligation upon the grantee, which he can not evade without the consent of the other party concerned. *Ib.*
11. *Nudum Pactum.—No Liability for Non Performance.*—There is no liability for failing to perform a *nudum pactum*. *Metzger v. Franklin Bank, 359*
12. *Mortgage.—Foreclosure.—Subsequent Purchaser.—Taxes and Improvements.—Attorney—Unauthorized Contract of Settlement.—Ratification.—Deed.*—Where it is adjudged in an action by A. to foreclose a mortgage that he shall pay to B., who is a subsequent purchaser, a certain sum of money for taxes paid and improvements made by the latter, and that B. shall thereupon execute a deed to A. for the real estate, and afterwards A.'s attorney, although having no authority to that end (of which want of authority B. is ignorant), enters into a contract with B. that the payment of the judgment and the delivery of the deed and possession of the real estate shall constitute a full settlement of the matters in controversy between the parties, and the money is thereupon paid, the deed executed and possession of the real estate delivered, A. can not, upon a subsequent reversal of the judgment on appeal, he having received and retained the benefits of the contract, and thereby ratified the same, recover from B. the money paid. *Travellers Ins. Co. v. Patten, 416*

#### CONTRIBUTION.

See TENANTS IN COMMON, 1, 2.

## CONVERSION.

See CHATTEL MORTGAGE, 1, 2; CONTRACT, 2; DECEDENTS' ESTATES, 9.

1. *Damages.—Complaint.*—A complaint alleging the conversion by the defendant of property of a given value belonging to the plaintiff, shows that the latter is damaged to the value of the property, without a specific allegation to that effect. *Ryan v. Hurley, 115*
2. *Same.—Insufficient Complaint.*—A complaint for conversion which fails to allege either that the property converted was of any value, or that the plaintiff sustained any damage by reason of the conversion, is bad. *Ib.*

## CONVEYANCE.

See CONTRACT, 12; DEED; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; LANDLORD AND TENANT, 2; MARRIAGE, 3; REAL ESTATE.

1. *Husband and Wife.—Land in Other State.—Trust.—Common Law.*—Where the consideration for land situate in a State in which the common law is presumed to prevail is paid by a wife, and the conveyance taken in the name of the husband, without her consent, a trust will be held to result in favor of the wife, in the absence of a showing that the rule of the common law has been changed. *Buchanan v. Hubbard, 187*
2. *Same.—Conveyance by Infant.—Disaffirmance.*—Where the specific property received by an infant as a consideration for the conveyance of land remains in his hands at the time of disaffirming the conveyance, and is capable of return, he is bound to give it up; and if, after arriving at age, he disposes of the property received, or asserts title to it as his own, he thereby affirms the contract and can not recover the land conveyed by him. *Ib.*
3. *Same.—Infant Married Woman.—Disaffirmance.—Ratification.*—An infant married woman, a few days before she became of age, exchanged her land in this State for land in Kansas, the latter being conveyed to her husband. Possession was taken of the Kansas land and held for many years. While still in possession, the wife notified a remote grantee of her grantee of her disaffirmance of the conveyance, and commenced an action to recover possession. After the commencement of the action she joined her husband in conveying the Kansas land, the express purpose being to prevent its reclamation. *Held*, that the plaintiff never arrived at the mental state constituting a disaffirmance, and that the conveyance of the property received was a complete ratification of the former conveyance. *Ib.*
4. *Insanity.—Disaffirmance.—Complaint.*—A complaint to recover real estate alleged to have been conveyed by an insane grantor, without consideration, is good on a motion in arrest of judgment, although it does not aver a disaffirmance before the commencement of the action. *Lange v. Dammier, 567*

## CORPORATION.

See MANDAMUS, 1, 2.

1. *Powers.—Right to Borrow Money.*—Where general authority is given a corporation to engage in business, it takes the power, in the absence of charter restraints, as a natural person enjoys it, with all its incidents, and may borrow money to attain its legitimate objects, precisely as an individual, and bind itself by any form of obligation not forbidden. *Wright v. Hughes, 324*
2. *Same.—Insurance Company.—Borrowing Money.—Mortgage.—Ultra Vires.—Estoppel.*—A corporation organized under the law of this State providing for the organization of life and accident insurance companies, has power to borrow money and secure its payment by mort-

gaging its real estate, and where it has done so and used the money and subsequently become insolvent, neither the corporation nor the policy-holders will be heard to assert that the mortgage is void on the ground that the corporation had no power to engage in the transaction in which the borrowed money was used. *Ib.*

3. *Same.—Lender's Knowledge of Use to be Made of Money.*—A mortgage executed by a corporation to secure money borrowed by it, to be used in a transaction in which it has no power to engage, may be enforced, if no statutory prohibition is involved, where the lender was not in complicity with the borrower in carrying out the *ultra vires* transaction, although he may have known of the purpose for which the money was obtained. *Ib.*
4. *Same.—Estoppel to Deny Power to Contract.*—Where a contract has been executed and fully performed on the part of the corporation or of the person with whom it contracted, neither party will be permitted to assert that the contract was not within the power of the corporation. *Ib.*

### CORRECTION OF RECORD.

See MANDAMUS, 3, 4.

### COSTS.

See REPLEVIN, 4.

1. *Judgment for.—Right to Enter after Final Disposition of Cause.—Change of Venue.—Failure to Perfect.*—Where, upon the failure of a party to perfect a change of venue applied for by him, the court sustains a motion to tax the costs against him, as provided in section 413, R. S. 1881, and the sustaining of the motion is entered of record, but no judgment for such costs is rendered, the court has jurisdiction, upon a proper application made by the adverse party after the dismissal of the cause, to then enter the judgment. *Lots v. Scott, 434*
2. *Will.—Special Bequest.—Cost of Administration.*—Where a testator bequeaths the proceeds of a promissory note to certain named legatees, and follows this with a general bequest of all his other property to another person, no part of the specific bequest is liable for the costs of administration, if the property disposed of generally is sufficient for that purpose. *Corya v. Corya, 593*

### COUNTY ASYLUM.

See APPRENTICE.

### COUNTY COMMISSIONERS.

See APPEAL, 1.

1. *Judgment of.*—The judgment of the board of county commissioners, upon a matter of which it has jurisdiction, is as binding upon the parties as the judgment of any other court. *Maxwell v. Board, etc., 20*
2. *Same.—Appeal.—Res Judicata.*—Where a claim, filed before the board of county commissioners for damages sustained by reason of a defective bridge, was rejected in 1883, the only remedy of the claimant, under the law then in force, was by appeal from the judgment. *Ib.*
3. *Same.—Presentation of Claims.—Act of 1885.—Retrospective Effect.*—Statutes must be construed as having a prospective operation, unless a different intention is apparent; as no such intention is shown by the act of 1885 (Acts of 1885, p. 80), relating to the presentation of claims against counties, it can not be given a retrospective effect. *Ib.*
4. *Same.—Right of Trial by Jury.—Constitutional Guaranty.—Onerous Condition.*—The act of March 29th, 1879, requiring all claims against counties to be filed and adjudicated before the board of commissioners, is not in conflict with the constitutional provision guaranteeing

the right to a trial by jury because it requires the claimant, upon the rejection of his claim, to give bond for costs in order to appeal to the circuit court, where a trial by jury may be had. *Ib.*

5. *Building or Repairing Bridge.—Discretion.—Mandate.*—When the question of building or repairing a bridge involves merely the matter of public convenience, the subject, under section 2885, R. S. 1881, is entirely within the discretion of the county commissioners, and when, in the exercise of that discretion, they have refused to build or repair the bridge, they can not be compelled to do so by mandate.

*State, ex rel., v. Board, etc., 444*

6. *Same.—Destruction of Bridge.—Abandonment.—Repair.—Public Convenience.*—Where a bridge is practically destroyed, and the alternative is presented of repairing it or of abandoning it and resorting to some other means or place in order to cross the stream, the question is then one of public convenience, and is left by the statute to the discretion of the county commissioners; and if they determine that it is impracticable, on account of the condition of the county revenues, to repair and maintain the bridge, they can not be coerced by mandate. *Ib.*

#### COURTS.

See CIRCUIT COURT; SPECIAL JUDGE; SUPERIOR COURT; SUPREME COURT.

#### CRIMINAL LAW.

See APPEAL, 2.

1. *Murder.—Indictment.*—For an indictment for murder, which is held to be good, see opinion. *Kahlenbeck v. State, 118*
2. *Same.—Evidence.—Declarations of Accused Prior to Homicide.*—Where, upon the arrest of one charged with the murder of a peddler, articles of merchandise corresponding with those in the possession of the deceased shortly before his death are found in the accused's trunk, declarations of the latter, prior to the murder, that he had bought articles of that kind from a peddler, are not competent. *Ib.*
3. *Same.—Evidence of Character.—Admissibility of.*—A party charged with crime in this State, who undertakes to introduce evidence of his character, must be confined to the particular trait of character involved in the charge against him; so, in a prosecution for murder, the general reputation of the accused for peace and quietude may be shown, but his reputation for morality may not. *Ib.*
4. *Same.—Order of Introducing Evidence.—Discretion of Trial Court.*—It is within the discretion of the trial court to permit the State, after the defendant has begun to introduce his evidence, to introduce material evidence for the prosecution, although it is properly matter in chief, the defendant being given full opportunity to meet it. *Ib.*
5. *Same.—Abuse of Discretion.—Reversal of Judgment.*—The court may, in its discretion, in all cases, admit original testimony, even after the evidence has closed, and the cause will not be reversed for that reason, unless it clearly appears that there was an abuse of discretion. *Ib.*
6. *Arson.—Attempt to Commit.—Indictment.*—An indictment charging that the defendant did "unlawfully, feloniously and wilfully attempt to set fire to and burn and destroy" a building, is bad, no act being charged. *Kinningham v. State, 332*
7. *Same.—Indictment Must State the Acts Done.*—To constitute crime there must be both an act and a guilty intention, and the acts done by the accused must be stated in the indictment. *Ib.*
8. *Desecration of the Sabbath.—Work of Necessity.—Barber.—Shaving Customer*



- on Sunday.*—Whether the shaving of a customer, by a barber, on Sunday is a work of necessity, within the meaning of the exception contained in the statute prohibiting the desecration of the Sabbath, is a question of fact for the determination of the jury, under proper instructions from the court. *Ungericht v. State, 379*
9. *Affidavit.—Motion to Quash.—Agreement as to Grounds of Objection.*—An agreement between the prosecuting attorney and the counsel for the accused as to what objection is made to the affidavit, can not be regarded, and if the affidavit is bad it will be so held, without reference to the ground upon which the motion to quash is rested. *State v. Burnett, 392*
  10. *False Representations.—When not Criminal.*—A criminal prosecution can not be based upon false representations which are not of such a character that a man of common understanding is justified in relying upon them. *Ib.*
  11. *Affidavit Not Sworn to.—Motion to Quash.*—A paper purporting to be an affidavit charging the offence of assault and battery, but not sworn to, is bad on a motion to quash. *Swiney v. State, 478*
  12. *New Trial.—Error in Admitting Evidence.*—A cause assigned as a reason for a new trial, that the court erred "in permitting evidence to be given to the jury which was incompetent," is too indefinite to present any question on appeal. *Benson v. State, 488*
  13. *Confession under Inducement.—Evidence.*—Where an officer visits in prison one accused of murder, and says to him, "There is only one way out of this, and that is, tell the truth," whereupon the accused confesses the killing, the officer's remark is merely an inducement, and not a threat, and under section 1802, R. S. 1881, the confession, with all the circumstances, may be given in evidence. *Ib.*
  14. *Murder.—Motive.—Evidence of Assault upon Other Person.*—Upon the trial of one accused of murder, evidence of an assault, and its character, upon the wife of the deceased, following closely after the killing of the husband, is competent as tending to show the motive which led to the crime, where the theory of the prosecution is that the accused supposed the husband and wife were obstacles in the way of his marriage with a girl residing with them. *Ib.*
  15. *Unsoundness of Mind.—Evidence of Motive Consistent with Sanity.*—Where one charged with murder introduces evidence to prove that he was of unsound mind when the crime was committed, any evidence on the part of the State tending to show a motive for the killing, consistent with reason and soundness of mind, is competent, and the fact that it was permitted to be introduced in chief instead of in rebuttal is not available error. *Ib.*
  16. *Instructions.—Time of Asking.*—An instruction asked after the argument has closed comes too late, and it is not error to refuse to give it. *Ib.*
  17. *Same.—Refusal of Duplicate Instruction.*—Where the court gives an instruction covering a given subject, it is not error to refuse to give another instruction asked by a party upon that subject. *Ib.*
  18. *House of Ill-Fame.—Continuous Offence.—Former Conviction.*—The offence of keeping a house of ill-fame, as defined by section 1994, R. S. 1881, is a continuing one, and one conviction is a bar to all other prosecutions for the continuous keeping of the same house prior to the returning of the indictment upon which the conviction was had. *Freeman v. State, 501*

## DAMAGES.

See ASSAULT AND BATTERY; CONVERSION; DEED, 2; GUARDIAN AND WARD; HIGHWAY; HUSBAND AND WIFE, 2; LIBEL; MASTER AND SERVANT; MUNICIPAL CORPORATION, 1 to 6; NEGLIGENCE; PARENT AND CHILD; RAILROAD; SEDUCTION; SURVIVAL OF CAUSE OF ACTION, 1; TENANTS IN COMMON, 3, 4.

## DEAF AND DUMB INSTITUTE.

See BENEVOLENT INSTITUTIONS, 1 to 3.

## DEBTOR AND CREDITOR.

See ATTORNEY AND CLIENT; CHATTEL MORTGAGE; DECEDENTS' ESTATES, 9, 10; FRAUDULENT CONVEYANCE.

*Fruits of Vigilance.*—One creditor has a right to obtain security for his claim, if it be honest, to the exclusion of other creditors.

*Walling v. Lewis, 496*

## DECEDENTS' ESTATES.

See COSTS, 2; DESCENT; EXECUTORS AND ADMINISTRATORS; PRINCIPAL AND SURETY; SEDUCTION, 5; WIDOW; WILL.

1. *Sale of Real Estate.—Cord-Wood and Growing Crops.—Rights of Heirs.*—The purchaser of real estate at an administrator's sale acquires no title to cord-wood situate thereon, nor to growing crops sowed by the heirs of the decedent, or their tenants, after the decedent's death.

*Barrett v. Choen, 56*

2. *Same.—Reservation of Crops.—Administrator's Statement at Sale.*—A statement made by an administrator, at a sale of real estate, that the crops thereon are not reserved, can not prejudice the rights of the heirs in crops sowed by them or their tenants.

*Ib.*

3. *Same.—Parties.—Judgment.*—Persons who are made parties, as heirs, to a proceeding by an administrator to sell real estate, are only affected by the judgment in their capacity as heirs.

*Ib.*

4. *Claim Against.—General Denial.—Defences Admissible Under.*—Where a general denial is filed to a claim against an estate, all matters of defence, except set-off and counter-claim, may be given in evidence thereunder.

*Griffin v. Hodshire, 235*

5. *Conveyance by Heir.—Administrator's Sale.—Parties.*—An heir, who has conveyed his interest in a decedent's real estate, is not a necessary party to an application by the administrator for an order to sell such real estate, and, if not a party, is not concluded by the proceedings.

*Platt v. Brickley, 333*

6. *Same.—Failure of Title.—Laches of Grantee.—Promissory Note.*—In such case, in an action by the grantor heir against his grantee upon a purchase-money note, a reply to the defence of a failure of title, that the defendant had assumed to pay the indebtedness to pay which the real estate was sold by the administrator, but had failed to do so, is good.

*Ib.*

7. *Claim.—Allowance.—Employment of Counsel to Resist.—Conclusive Adjudication.—Sole of Real Estate.*—Where persons claiming an interest in real estate, as the grantees of a decedent's heirs, employ counsel to assist the administrator in resisting the allowance of a claim filed against the estate, an adjudication that the claim is valid is conclusive upon them, and they can not afterwards bring it in question in a proceeding by the administrator to sell the land to pay debts.

*Smith v. Gorham, 436*

8. *Evidence.—Record of Allowance.*—The record of the allowance of a claim against the estate of a decedent is *prima facie* evidence of the validity and amount of the claim.

*Ib.*



9. *Indemnifying Chattel Mortgage.—Execution and Sale.—Conversion of Mortgaged Property.*—An administrator who has taken a chattel mortgage from an insolvent debtor to indemnify the estate against loss on account of the decedent having become surety for the mortgagor, may, without first paying the debt, maintain an action against an unsecured creditor of the mortgagor who has caused the mortgaged property to be seized and sold on execution in satisfaction of his claim. *Walling v. Lewis, 496*
10. *Same.—Right of Administrator to Take Mortgage.—Order of Court.*—It is not necessary that an administrator should obtain an order of court to that end before taking a mortgage to indemnify the estate in his hands against loss. *Ib.*

DEED.

See CONTRACT, 12; CONVEYANCE; PLEADING, 14; RAILROAD, 3; REAL ESTATE; SHERIFF'S SALE, 2.

1. *Description.—Mistake.—When Deed not Void.*—The omission from the description contained in a deed of the name of the State in which the land is situate does not render the deed void, if, taking all the facts appearing upon its face, with the legal presumptions which flow from them, a true description may be supplied by the aid of averments and proof. *Calton v. Lewis, 181*
2. *Same.—Reformation.—Breach of Covenant of Seizin.—Damages.*—In such a case, it is not essential to the grantee's right to recover damages for a breach of the covenant of seizin that the deed should first be reformed; the deed not being void, it is only necessary that the identity of the land described be proved, under proper averments, and that a breach of the covenant, with resulting damages, be shown. *Ib.*
3. *Same.—Mistake of Fact.—What is.*—It is a mistake of fact when, through ignorance, inadvertence, negligence or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did. *Ib.*
4. *Same.—Executed in Another State.—Proof of Statutory Sufficiency.*—Whether a deed was executed in conformity with the statute of the State in which it purports to have been executed, so as to constitute a valid conveyance, is susceptible of proof under an averment that the deed was executed and the land conveyed by the grantor. *Ib.*
5. *Delivery.—Non Est Factum.*—Where, in an action founded upon a deed, there is no plea of *non est factum*, the execution of the deed, including its delivery, is admitted. *Louisville, etc., R. W. Co. v. Power, 269*
6. *Same.—Mistake in Grantee's Name.—Estoppel.*—Where a deed conveying a right of way is delivered to and accepted by a railroad company, which thereafter asserts title to the land thereby conveyed, it can not repudiate the covenants of the deed on the ground that the grantee was not properly named. *Ib.*
7. *Same.—Parol Evidence.*—It is competent to prove by parol the facts connected with the preparation of a deed; and, where there is a mistake of fact, it is proper to prove the contract between the parties. *Ib.*

DELIVERY.

See DEED, 5.

DEPOSITOR.

See BANKS AND BANKING, 1 to 3; EXECUTORS AND ADMINISTRATORS.

DESCENT.

See LIFE INSURANCE, 7; WASTE; WIDOW; WILL, 7.

1. *Degrees of Kindred.—How Computed.*—Degrees of kindred are com-

puted in this State according to the rules of the civil law, and the statute of descents covers every conceivable state of circumstances that can surround the descent of property. *Bruce v. Bissell, 525*

2. *Same.—Next of Kin.—Great-Grandmother.*—Under section 2471, R. S. 1881, the real estate of an intestate descends to a great-grandmother, as being "the next of kin in equal degree of consanguinity," in preference to a great-aunt or uncle of the same maternal or paternal line. *Ib.*
3. *Same.—Will.—Construction of.—Vested Remainder.*—A testator devised land to his daughter for life, with remainder over in fee to her child or children, in case she should survive him, leaving a child or children. By a subsequent clause of the will the testator devised to his widow a life estate in the same land, and after her death to his right heirs in fee. The daughter survived the testator, but died soon after, leaving a son, who also died, leaving a son. The latter died unmarried and without issue, leaving the testator's widow, his great grandmother, as his next of kin.  
*Held*, that the daughter's son took a vested remainder in fee, which was in nowise affected or cut down by the doubtful expressions contained in the subsequent clause of the will, and that it passed to the testator's widow upon the death of her great-grandson. *Ib.*

#### DESCRIPTION OF REAL ESTATE.

See DEED, 1 to 3; DRAINAGE, 2; REAL ESTATE, 13.

#### DESECRATION OF SABBATH.

See CRIMINAL LAW, 8.

#### DILIGENCE.

See INSURANCE 14, 15; NEW TRIAL, 3.

#### DISAFFIRMANCE OF CONVEYANCE.

See CONVEYANCE.

#### DISCRETIONARY POWER.

See COUNTY COMMISSIONERS, 5, 6; CRIMINAL LAW, 4, 5; TOWNSHIP TRUSTEE, 4, 5.

#### DIVORCE.

See MARRIAGE.

#### DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIAGE; MARRIED WOMAN; MASTER AND SERVANT.

#### DRAINAGE.

See MUNICIPAL CORPORATION, 1 to 4.

1. *Assessment.—Enforcement of.—Complaint.*—A complaint to enforce the collection of an assessment under the drainage act of 1883 is bad unless a copy of the report of the commissioners making the assessment, in so far as it relates to the land in question, is filed therewith. *Ross v. State, etc., 90*
2. *Same.—Description.—When Void for Uncertainty.*—An assessment upon land described as "Pt. S. E.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E." and "Pt. S. W.  $\frac{1}{4}$  of N. E. qr. frac. sec. 7, T. 6 S., R. 5 E." is not enforceable, the description being void for uncertainty. *Ib.*

#### EASEMENT.

See RAILROAD, 3 to 9.

**EJECTMENT.**

See LANDLORD AND TENANT, 2; RAILROAD, 5; REAL ESTATE, 2, 7, 8.

**EMBLEMENTS.**

See DECEDENTS' ESTATES, 1, 2; WILL, 6.

**ESTOPPEL.**

See CANALS, 4; CORPORATION, 2, 4; DECEDENTS' ESTATES, 7; DEED, 6; INSURANCE, 12; JUDGMENT, 9; MARRIED WOMAN, 1, 2; PARTITION; PROMISSORY NOTE, 1; RAILROAD, 5; REAL ESTATE, 8; SALE, 3.

**EVIDENCE.**

See BANKS AND BANKING, 3; BILL OF EXCEPTIONS; COMMON CARRIER; CONTRACT, 2, 3; CRIMINAL LAW, 2 to 5, 12 to 15; DECEDENTS' ESTATES, 8; DEED, 7; FORMER RECOVERY; JUDGMENT, 1 to 4; LIBEL; MARRIAGE, 2, 3; NEGLIGENCE, 1 to 5; NEW TRIAL, 3, 4; PRACTICE, 3; RAILROAD, 6; SEDUCTION, 3, 4; SLANDER; WILL, 1 to 5, 8; WITNESS.

1. *Relevancy.—Payment.*—The question in controversy between A. and B was whether the latter had paid the former one hundred and forty dollars in May, 1883, on a debt. V., a witness called by B., testified that he bought a horse from B. in that month, and paid him one hundred and fifty dollars for it, not far from a bank. B. testified that he sold the horse to V., received the money and took it to the bank, intending to deposit it, but meeting A. there paid him one hundred and forty dollars of it.

*Held*, that the testimony of V. was competent. *Morgan v. Weir*, 178

2. *Exclusion of.—Question on, How Reserved.—Practice.*—In order to reserve a question upon the exclusion of testimony, a pertinent question must be propounded to the witness, and, upon objection, a statement made to the court as to the testimony which will be given in answer thereto, and an exception must be reserved at the time the ruling is made.

*Kern v. Bridwell*, 226

3. *Exclusion of Testimony.—Saving Question Upon.—Practice.*—In order to save any question upon the exclusion of testimony, a proper question should be asked, and, upon objection being made, the fact expected to be proved by the witness should be stated to the court.

*Morris v. Morris*, 341

4. *Offer to Introduce.—Practice.*—To present any question upon the exclusion of evidence, the offer to introduce it must be specific; if the evidence is parol, the witness should be put upon the stand and questioned, and the testimony expected stated; if the evidence is documentary, it should be identified and then offered.

*Smith v. Gorham*, 436

5. *Medical Witness.—Opinion as to Probable Results of Personal Injury.*—It is competent to ask a medical witness, either on direct or cross-examination, to give his opinion as to the probable results of an injury to the person.

*Louisville, etc., R. W. Co. v. Lucas*, 583

**EXAMINATION OF PARTY.**

See WITNESS.

**EXECUTION.**

See DECEDENTS' ESTATES, 9.

**EXECUTIVE POWERS.**

See CONSTITUTIONAL LAW.

## EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; PLEADING, 2; PRINCIPAL AND SURETY; SEDUCTION, 5; SURVIVAL OF CAUSE OF ACTION; WILL, 6, 8.

*Administrator.—Deposit of Trust Funds in Individual Name.—Liability for Loss.*—Where an administrator deposits trust funds in a bank in his individual name and takes a certificate of deposit payable to his own order, any loss which occurs by reason of the failure of the bank is his loss, and he is bound to account to the persons entitled for the full amount deposited. *Corya v. Corya, 593*

## EXHIBIT.

See PLEADING, 14, 15.

## EXPERT AND OPINION EVIDENCE.

See EVIDENCE, 5; NEGLIGENCE, 2.

## FALSE REPRESENTATIONS.

See CRIMINAL LAW, 10.

## FARM CROSSING.

See RAILROAD, 1, 2.

## FENCES.

See RAILROAD, 1, 2, 7.

## FINES AND FORFEITURES.

See BUILDING ASSOCIATION.

## FORECLOSURE.

See MORTGAGE; TAXES, 1, 2.

## FORFEITURE.

See APPEAL, 2.

## FORMER CONVICTION.

See CRIMINAL LAW, 18.

## FORMER RECOVERY.

*Evidence.—Pleading.*—Where the only answer pleaded to the cause of action stated in one paragraph of complaint is a general denial, evidence of a former recovery under a plea addressed to another paragraph is not available. *Louisville, etc., R. W. Co. v. Cauley, 143*

## FRAUD.

See CHATTEL MORTGAGE, 3 to 5; FRAUDULENT CONVEYANCE; LIBEL; SALE.

1. *Insurance.—Execution of Assignment.—Misrepresentation as to Character of Instrument.—Laches.*—Where a widow, the sole heir, ignorant of the existence of insurance upon the life of her deceased husband, but being able to read, and having opportunity to do so, signs and acknowledges the execution of an assignment of a policy of insurance written upon the policy, without reading or examining either the policy or the assignment, or requiring the same to be read to her, and relying blindly upon the representation of the assignee, who has possession of the policy, and who has not made known to the widow its existence, that the writing which he presents for her signature is a receipt for money paid, she is guilty of such laches as will bar an action to avoid the assignment, in the absence of a stronger showing of fraud. *Miller v. Powers, 79*
2. *Same.—Statute of Limitations.—Concealment of Right of Action.*—The concealment of a right of action for relief against fraud, which will ex-

tend the time for bringing the action beyond the six years limited by clause 4 of section 292, R. S. 1881, must consist of more than the mere silence of the person subject to the action; there must be something of an affirmative character, something said or done which has the effect of preventing discovery of the right of action by the person entitled to the same. *Ib.*

3. *Special Finding.*—Where fraud is essential to the existence of a cause of action, the plaintiff will fail if it is not found and stated in the special finding as a substantive fact. *Wilson v. Campbell, 286*

#### FRAUDULENT CONVEYANCE.

See CHATTEL MORTGAGE, 4; REAL ESTATE, 9; SEDUCTION, 5.

*Complaint to Set Aside.*—*Averment as to Debtor's Insolvency.*—A complaint to set aside a conveyance as fraudulent as against creditors is bad if it fails to aver that the debtor, after the conveyance, had not sufficient property left to pay his debts. *Sell v. Bailey, 51*

#### GAMBLING CONTRACT.

See PROMISSORY NOTE, 2 to 6.

#### GENERAL ASSEMBLY.

See BENEVOLENT INSTITUTIONS; CONSTITUTIONAL LAW.

#### GUARDIAN AND WARD.

*Wrongful Death of Ward.*—*Damages.*—*Right of Action.*—*Parent.*—A guardian has no right of action for the wrongful death of his infant ward, except to reimburse the ward's estate for expenditures which he has been required to make for care and medical attendance and funeral expenses, the right of action for general damages for loss of services, etc., being in the father or mother. Section 266, R. S. 1881. *Louisville, etc., R. W. Co. v. Goodykoontz, 111*

#### HARMLESS ERROR.

See PLEADING, 6, 10; VERDICT, 4.

#### HIGHWAY.

See APPEAL, 1; CANALS; RAILROAD, 12.

*Railroad.*—*Leaving Cars in Highway.*—*Frightened Horses.*—*Liability for Injury Caused by.*—*Complaint.*—A complaint against a railroad company for damages caused by the plaintiff's horses taking fright at cars alleged to have been "unlawfully, carelessly and negligently placed upon a public highway," is not bad on demurrer for failing to allege that the cars were permitted to remain upon the highway an unreasonable time. *Cleveland, etc., R. R. Co. v. Wynant, 539*

#### HOSPITAL FOR INSANE.

See BENEVOLENT INSTITUTIONS, 4; CONSTITUTIONAL LAW, 8 to 10.

#### HOUSE OF ILL-FAME.

See CRIMINAL LAW, 18.

#### HUSBAND AND WIFE.

See CONVEYANCE, 1 to 3; MARRIAGE; MARRIED WOMAN; REAL ESTATE, 8; SEDUCTION, 6; WIDOW.

1. *Conveyance by Husband to Wife.*—*Presumption as to Character of.*—A conveyance of property from a husband to his wife is presumably a voluntary settlement, or provision for her benefit, and if it is reasonable it will be upheld against the husband, unless obtained by fraud or undue influence. *Corcoran v. Corcoran, 138*
2. *Same.*—*Agreement by Wife to Support Husband.*—*Damages.*—A contract

by a wife whereby she agrees, in consideration of a conveyance to her of real estate by her husband, to support the latter during his natural life, is void, and no cause of action for damages for a breach thereof can accrue to the husband. *Ib.*

#### ILLEGAL CONTRACT.

See PROMISSORY NOTE, 2 to 6.

#### INDEMNIFYING AGREEMENT.

See CONTRACT, 5, 6; PROMISSORY NOTE, 2, 3, 5.

#### INDEMNIFYING MORTGAGE.

See DECEDENTS' ESTATES, 9, 10.

#### INDICTMENT.

See CRIMINAL LAW, 1, 6, 7, 9.

#### INFANT.

See APPRENTICE; CONVEYANCE, 2, 3; GUARDIAN AND WARD; MASTER AND SERVANT; PARENT AND CHILD.

#### INJUNCTION.

See JUDGMENT, 8; MUNICIPAL CORPORATION, 9, 10; RAILROAD, 5; WASTE.

#### INSANITY.

See CONVEYANCE, 4; CRIMINAL LAW, 15.

#### INSTRUCTIONS TO JURY.

See BURDEN OF PROOF; CONTRACT, 4; CRIMINAL LAW, 16, 17; SEDUCTION, 4, 6; SUPREME COURT, 6; VERDICT, 6, 7.

1. *Supreme Court.—Practice.*—Instructions which are not brought into the record either by a bill of exceptions or as provided by section 533, R. S. 1881, are not presented for consideration on appeal.

*Van Meter v. Barnett, 35*

2. *Refusal to Give.*—It is not error to refuse to give instructions asked, unless they are in terms correct.

*Mosier v. Stoll, 244*

3. *Detached Clause.—Attack Upon.*—An attack upon a detached clause of an instruction will only avail when such clause makes the entire instruction erroneous.

*Cooper v. Smith, 313*

#### INSURANCE.

See FRAUD, 1; LIFE INSURANCE.

1. *Occupancy of Property.*—Where a complaint upon a policy of insurance, covering a barn, farming implements, hay, grain, stock, etc., alleges that on a certain day the barn, and the other property covered by the policy and in the barn at the time, were destroyed by fire, it sufficiently appears that the building was occupied at the time of its destruction.

*Phoenix Ins. Co. v. Pickel, 155*

2. *Same.—Complaint upon Policy.*—A complaint averring that the property insured was the plaintiff's property at the time the policy was issued, that it was on his premises when it was destroyed by fire, that the plaintiff was damaged to the value thereof, and that he had performed all the terms of the contract on his part, states a cause of action.

*Ib.*

3. *Same.—Burden of Proof.*—In an action upon a policy of insurance, the plaintiff need not aver the truth of statements contained in the application, nor the performance or non-performance of conditions subsequent, nor negative prohibited acts; but it is sufficient for him to show fulfilment of the conditions of recovery, and the burden is then upon the defendant to show a breach of warranties.

*Ib.*

4. *Same.—Divisibility of Policy.*—Where a policy of insurance covers several items of property, and the property is so situated that the risk on one item can not be affected without affecting the risk on the other items, such policy is entire and indivisible; but if the property is so situated that the risk on each item is separate and distinct, the policy is several and divisible. *Ib.*
5. *Same.—False Representations.—Divisible Risk.*—Where a policy covers a barn and its contents, and a dwelling and its contents, it is several and divisible as regards the barn and house, and false representations as to the condition of the house will not avoid the policy as to the barn and its contents. *Ib.*
6. *Same.—Condition Against Encumbrances.*—A provision in a policy, that "if the property shall hereafter become mortgaged or encumbered, this policy shall be null and void," relates to liens voluntarily placed upon the property by the insured, and does not apply to judgments or other liens created by law. *Ib.*
7. *Same.—Overvaluation.*—A policy of insurance will not be avoided on account of a breach of warranty as to the value of the property involved, unless the breach is a substantial one. *Ib.*
8. *Indivisible Risk.—Breach of Warranty.*—A policy of insurance covering a house and the personal property therein is entire and indivisible, and a breach of warranty which will avoid the policy as to one class of property will also avoid it as to the other.  
*Pickel v. Phenix Ins. Co., 291*
9. *Same.—Divisible Risk.*—Where a policy of insurance covers two or more buildings, which are so situated that the risk on each is separate and distinct, the policy is a divisible one, and breaches of warranty affecting the risk on one building constitute no defence to an action for the destruction of another. *Ib.*
10. *Same.—Condition of Property.—Encumbrance.—Value.*—Warranties that an insured house is twelve years old, when it is thirty, that the encumbrance on the land upon which the house is situate is \$1,000, when it is \$2,200, with a large accumulation of interest, and that the house is worth \$400, when it is worth only \$250, will avoid the policy. *Ib.*
11. *Same.—Agent.—Filling Blanks in Application.—Scope of Authority.*—An agent, authorized to take applications for insurance, acts within the scope of his authority when he fills out a blank application, and if, by his fault or negligence, it contains misstatements not authorized by the instructions of the applicant, the wrong will be imputed to the company. *Ib.*
12. *Same.—Writing False Answers.—Estoppel of Company.*—Where an agent, authorized by his company to take applications for insurance, writes false answers to questions contained in the application, without the knowledge and contrary to the directions of the applicant, who makes true answers to such questions, the company is estopped by the answers thus written by its agent. *Ib.*
13. *Same.—Value of Property.—Honest Judgment of Insured.*—Questions of value, when applied to real estate, are from necessity matters of mere opinion, and if the applicant for insurance gives the value of the property according to his honest judgment and opinion, there is no breach of warranty. *Ib.*
14. *Same.—Notice of Loss.—Unreasonable Delay.—Evidence.*—A provision in a policy requiring notice of loss to be given forthwith is void under section 3770, R. S. 1881, yet the assured is required under the policy to give notice within a reasonable time. An unexplained delay of fifty days is unreasonable, and the notice may be excluded from evidence. *Ib.*



15. *Same.—Diligence.—When Question for Jury and When for Court.*—Where the facts constituting diligence in giving notice are in dispute, what is a reasonable time is a question for the jury, under proper instructions; but where the facts are not in dispute, the question is for the court. *Ib.*

#### INSURANCE COMPANY.

See CORPORATION.

#### INTERROGATORIES TO JURY.

See VERDICT.

1. *What Improper.*—Interrogatories to the jury, which call for answers as to mere matters of evidence and not facts, are improper.  
*Louisville, etc., R. W. Co. v. Cauley, 142*
2. *Submission of.—Time of Asking.—Presumption.*—Everything will be presumed in favor of the action of the trial court, and if it does not appear by the record at what time the court was asked to submit interrogatories to the jury, its refusal to submit them will not be reviewed.  
*Morris v. Morris, 341*
3. *Items of Evidence.—Practice.*—Interrogatories which call merely for items of evidence should not be submitted to the jury.  
*Schnurr v. Stults, 439*

#### INTOXICATING LIQUOR.

See MANDAMUS, 6.

*License.—Nature of.—Police Power.*—A license to sell intoxicating liquors is not a contract, but a restrictive special tax imposed in the exercise of the police power of the State, and it may be changed or even annulled by the Legislature whenever the public welfare demands it.  
*State, ex rel., v. Bonnell, 494*

#### JUDGE PRO TEMPORE.

See SPECIAL JUDGE.

#### JUDGMENT.

See APPEAL; COSTS, 1; COUNTY COMMISSIONERS, 1, 2; DECEDENTS' ESTATES, 3, 7, 8; MARRIED WOMAN, 2; MORTGAGE, 1, 2; PARTITION; PRACTICE, 5, 6; REAL ESTATE, 2; REPLEVIN, 2; SHERIFF'S SALE, 1; SUPREME COURT, 3, 5; WILL, 13.

1. *Of Another State.—Action upon.—Loss of Complaint and Summons.—Proof of.—Deposition.*—In an action in this State upon a judgment rendered in another State, the depositions of the attorneys who obtained the judgment, and of the clerk of the court in which it was rendered, are competent to show the existence, loss and contents of the complaint and summons, and of the sheriff's return showing service upon the defendants.  
*Bailey v. Martin, 103*
2. *Same.—Transcript.—Clerk's Certificate.—Evidence.*—The certification of the transcript of a judgment as a "true and correct copy" instead of as a "true and complete copy," is good. *Ib.*
3. *Same.—Variance.*—Where the judgment sued on and the judgment shown by the transcript introduced in evidence are substantially the same, there is no material variance. *Ib.*
4. *Same.—Court of Another State.—Jurisdiction.—Presumption.*—Where it appears that the court of another State which rendered a judgment sued upon in this State, was a court of record, having a judge, clerk and seal, its records and proceedings are brought within sections 454 and 472, R. S. 1881, and its jurisdiction and the regularity of its proceedings will be presumed until the contrary is shown. *Ib.*
5. *Same.—Evidence.—Formal Irregularities.*—Mere formal irregularities



constitute no ground for rejecting a duly certified record of a judgment of another State. *Ib.*

6. *Relief From.—Surprise and Excusable Neglect.—Meritorious Defence.*—A complaint under section 396, R. S. 1881, by a tenant in common, to be relieved from a judgment by default, quieting his co-tenant's title, which shows that the plaintiff was misled as to the character of the action by the manner in which the complaint was prepared, and by the representations of the defendant's counsel as to the kind of relief sought, and by the violation of an agreement to dismiss upon complying with a certain condition, and showing, as a defence to the action, that the plaintiff has paid liens against the joint property, upon which he is entitled to a contribution lien, is good.

*Moon v. Jennings, 130*

7. *Review of.—Granting of Application.—Supreme Court will only Interfere when Injustice is Shown.*—The rule that the Supreme Court will not reverse a judgment on account of the action of the trial court in granting a new trial, unless it is apparent that great injustice has been done, applies also to the action of the lower court in granting an application for the review of a judgment, the object sought by both proceedings being the same, viz., a re-trial of the cause.

*Hornady v. Shields, 201*

8. *Injunction.—Special Judge.—Irregular Appointment.—Collateral Attack.*—A party can not have the collection of a judgment enjoined, as being void, by alleging matter *dehors* the record, showing that the special judge who presided at the trial of the cause was not regularly appointed; it is only where the record affirmatively shows the presiding judge's want of authority that a collateral attack will lie.

*Littleton v. Smith, 230*

9. *Res Judicata.—Estoppel.*—Where a judgment debtor institutes an action to have the judgment declared satisfied, it is his duty to bring forward any matter, then existing, which will entitle him to the relief sought, and all matters which he might have adduced in that proceeding, but omitted, are barred by the judgment then rendered, and can not be litigated in an action against his representatives upon the original judgment.

*Griffin v. Hodshire, 235*

10. *Foreclosure of Tax Lien.—Judgment Liens.—When Divested.*—A sale under a decree of the Marion Superior Court foreclosing a tax lien divests the liens of judgment creditors who are parties to the proceeding.

*Meikel v. Meikel, 421*

#### JUDICIAL SALE.

See MORTGAGE, 1, 3; REAL ESTATE, 8, 13; SEDUCTION, 5; SHERIFF'S SALE.

#### JURISDICTION.

See JUDGMENT, 4; MANDAMUS, 3; MUNICIPAL CORPORATION, 9, 10; PRACTICE, 5; SUPERIOR COURT; TAXES, 1.

#### JUROR.

1. *Action against City.—Taxpayer Incompetent.*—In an action against a city for damages resulting from an injury caused by a defective street or sidewalk, the fact that a juror is a resident taxpayer of the city is cause for challenge. *City of Goshen v. England, 368*
2. *Same.—Service Within Year.—Cause for Challenge.*—It is cause for challenge that one called as a juror has served in that capacity during the year immediately preceding. Section 1395, R. S. 1881. *Ib.*
3. *Same.—Regular Panel.—Vacancy.—Presumption that Juror is Talesman.*—Unless it appears that one, not drawn as a member of the regular panel, and who has been serving during the term as a juror, was

placed upon the jury by the direction of the court as a member of the regular panel, to fill a vacancy, it will be presumed that he was a talesman, and subject to challenge under section 1395, R. S. 1881. *Ib.*

#### JURY.

See INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUROR; VERDICT.

#### JUSTICE OF THE PEACE.

See PLEADING, 12; REPLEVIN, 1, 2.

#### LANDLORD AND TENANT.

1. *Replevin.—Crops.—Special Finding.—Conclusion of Law.*—A special finding of facts, in an action of replevin, showing that the plaintiff had leased certain land for the term of one year, and as much longer as he desired to retain it, will not support a conclusion of law that he is entitled to clover seed produced upon the land in the third year after the lease was executed, unless there is also a finding that the tenancy continued up to that time. *Hess v. Hess, 66*
2. *Year to Year Tenancy.—Conveyance of Leased Premises.—Rights of Grantee.*—A tenancy from year to year is not changed by a conveyance of the real estate by the lessor, and the grantee may terminate it by proper notice and recover possession, the same as his grantor might have done. *Swope v. Hopkins, 125*

#### LAW OF OTHER STATE.

1. *Rule in Absence of Proof of.*—The laws of a State, to whose courts a party appeals for redress, furnish in all cases *prima facie* the rule of decision, and if either party claims the benefit of a different rule he must aver and prove it, like other facts of which the courts do not take judicial notice. *Buchanan v. Hubbard, 187*
2. *Same.—Common Law.—Presumption as to.*—In respect to general principles, the common law is presumed to be in force in most of the States, subject to such modifications as may have resulted from legislative or judicial construction, and if no such modifications are shown, the courts of this State will apply such principles as they are interpreted in this State. *Ib.*
3. *Same.*—There is no presumption that the common law prevails in the States in which civil governments were established prior to their becoming territories or States of the Union, but, in the absence of a showing to the contrary, it will be presumed that the law of such States is the same as that which prevails here. *Ib.*
4. *Same.—Civil Law.—Louisiana Purchase.—State of Kansas.*—The State of Kansas, although territorially a part of the Louisiana purchase, is not one of the States in which the principles of the civil law ever prevailed. *Ib.*

#### LEGISLATIVE APPOINTMENTS.

See CONSTITUTIONAL LAW.

#### LEGISLATURE.

See BENEVOLENT INSTITUTIONS; CONSTITUTIONAL LAW.

#### LIBEL.

See SLANDER.

1. *Mitigation of Damages.—Pleading.*—Evidence in mitigation of damages is admissible under an answer of general denial. *Mosier v. Stoll, 244*
2. *Officer of Insurance Society.—Charge of Fraud and Embezzlement.—Justification.—Evidence.*—In an action for libel wherein it is alleged that the defendants, the publishers of a newspaper, charged the managers of

an insurance company, of whom the plaintiff was one, with fraudulently conducting the concern and with embezzling the funds of the society, evidence of the business methods and practices of the society are competent evidence under a plea of justification. *Ib.*

3. *Motive of Publisher.—Malice.*—If the defendants, in publishing the article complained of, acted from an honest motive to protect the public against impostors, or upon information tending to show that the plaintiff was engaged in a corrupt scheme to obtain and appropriate money for his own profit, this fact would rebut malice and reduce the damages. *Ib.*
4. *Grounds for Inferring Truth of Publication.—Evidence.*—Circulars issued by the officers of the society, which contained false statements and furnished grounds for inferring that they were made to enable the plaintiff and his associates to secure and appropriate money belonging to the society, were admissible on behalf of the defendants, either in mitigation of damages or in justification of the publication. *Ib.*
5. *Question for Jury.*—It being shown that considerable sums of money belonging to the society were falsely accounted for in statements sent out by its officers, it was for the jury to determine, from the position of the plaintiff as the president of the society, the active part he took in its affairs, and other facts, whether or not he fraudulently appropriated the money. *Ib.*
6. *Entire Article to be Considered.—Examination of Witnesses.*—As an aid to the discovery and exhibition of the motive which influenced the author in writing and publishing an alleged libellous article, it is proper to refer, in the examination of witnesses, to all that was written, and it is also the duty of the court to consider the whole of the publication. *Ib.*
7. *Non-Libellous Charge.—Intent of Author.*—If a publication does not contain a libellous charge, then, no matter what the author intended, no action will lie. *Ib.*
8. *Meaning of Article.—When to be Determined by the Court and When by the Jury.*—Where the article is plainly unambiguous, the question of its meaning and character is for the court, but where a portion of an article is selected and declared on, and its meaning is ambiguous, then the question is for the jury. *Ib.*

#### LICENSE.

See ASSAULT AND BATTERY; INTOXICATING LIQUORS; MANDAMUS, 6.

#### LIEN.

See ATTORNEY AND CLIENT; CHATTEL MORTGAGE; JUDGMENT, 10; MORTGAGE, 3; SUPERIOR COURT; TAXES; TENANTS IN COMMON, 1, 2; WIDOW, 3, 4.

#### LIFE INSURANCE.

See FRAUD, 1.

1. *Action Upon Policy.—Complaint must Show Insurable Interest.*—A complaint upon a policy of insurance, issued to the plaintiff upon the life of another, is bad if it fails to aver that the plaintiff had an insurable interest in the life of the person insured.  
*Burton v. Connecticut M. L. Ins. Co., 207*
2. *Same.—Grandfather and Grandchild.—Insurable Interest.*—As a rule, a grandfather is under no legal obligation to support or provide for his granddaughter, and in an action by the latter upon a policy of insurance issued directly to her upon the life of her grandfather, the court can not infer, as a matter of law, from an averment of the relation-

- ship between the parties, such an insurable interest in the life of the grandfather as will uphold the policy. *Ib.*
3. *Same.—Facts Dehors the Policy.—Showing of.*—One who accepts a policy of insurance issued to him upon the life of another, will not be permitted to allege and prove an existing state of facts *dehors* the policy to control its legal effect. *Ib.*
  4. *Benefit Society.—Change of Beneficiary.—Vested Interest.*—Where a certificate issued by a benefit association is payable to the heirs or legal representatives of the member, such beneficiaries have no vested interest prior to the death of the insured, and the latter may designate another beneficiary at any time during his life. *Milner v. Bowman, 448*
  5. *Same.—Assignment of Certificate.*—Where a member of a benefit association has a right to change the beneficiary named in his certificate, and no prescribed mode of making the change is shown, an assignment of the certificate, with directions to the association to pay the proceeds to the assignee, effects a change. *Ib.*
  6. *Same.—Insurable Interest.*—Every person has an insurable interest in his own life; and if one procures insurance upon himself and pays the premiums, it is immaterial whether or not the beneficiary designated by him, or the assignee of the policy, has an insurable interest in his life. *Ib.*
  7. *Same.—Vested Interest.—Death of Beneficiary.—Descent.*—Where beneficiaries, having a vested interest in a policy of insurance, die before the insured, who is their sole heir, the latter acquires their interest by inheritance, subject only to the claims of the beneficiaries' creditors, and may assign the same. *Ib.*
  8. *Same.—Assignment by Insured.—Insolvency.*—The fact that an insured is insolvent at the time of his death, does not affect the validity of an assignment of the policy made by him at a time when he was solvent. *Ib.*

## MANDAMUS.

See COUNTY COMMISSIONERS, 5, 6; TOWNSHIP TRUSTEE, 4, 5.

1. *Corporation.—Transfer of Stock.*—Mandamus will lie to compel the officers of a corporation to make a transfer of stock in its books where the petitioner has a clear legal right, and no other adequate remedy, but the writ will not lie where the petitioner's claim rests merely on an equitable right. *Burnsville T. P. Co. v. State, ex rel., 382*
2. *Same.—Turnpike Company.*—A corporation can not be compelled by mandate to do that which it would have no authority to do voluntarily; and as a turnpike company has no power to transfer upon its books one person's stock to another without the production of a written assignment, power of attorney or other proof of title, mandamus will not lie to compel it to do so. *Ib.*
3. *Jurisdiction.—Inferior Court.—Correction of Record.*—A writ of mandate may not be issued by the circuit court to compel a county auditor to correct an erroneous description of land appearing in the records of the board of county commissioners in a drainage proceeding had before such board. *White v. Burkett, 431*
4. *Same.—Proper Remedy.—Appeal.*—In such case the proper remedy is by an application to the board of commissioners, and the circuit court can only acquire jurisdiction by appeal from the judgment of the board. *Ib.*
5. *When Will Lie.*—The remedy by mandate can only be invoked in cases where a clear legal right is invaded, and where the writ is required to protect the petitioner from substantial injury. *State, ex rel., v. Bonnell, 494*

6. *Same.—License to Sell Intoxicating Liquors.—City.*—A vender of intoxicating liquors can not maintain an action for a mandate to compel a city treasurer to accept a license fee under an ordinance of the city, in order that he may, prior to the expiration of a license previously issued to him, demand of the city clerk a new license. *Ib.*

MARGINS.

See PROMISSORY NOTE, 2 to 6.

MARION SUPERIOR COURT.

See SUPERIOR COURT.

MARRIAGE.

1. *Validity of.—Living First Husband.—Divorce will be Presumed.*—In favor of the validity of a second marriage contracted by a woman while her first husband is alive, it will be presumed that the first marriage was legally dissolved by a divorce before the second was entered into, and one who asserts the invalidity of the later marriage must show that there had been no divorce. *Boulden v. McIntire, 574*
2. *Same.—Evidence.—Proof of Negative.—Burden.*—Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative; hence where one bases his claim to land upon the alleged invalidity of a marriage, he must, by proper proof, remove every presumption in favor of the legality of the marriage, although to do this he must prove a negative. *Ib.*
3. *Same.—Conveyance.—Quieting Title.—Evidence.*—Where a widow has conveyed land acquired by virtue of a second marriage contracted by her, and her grantee sues to quiet title as against relatives of the husband who assert the invalidity of the marriage, a transcript showing that the grantor's first husband obtained a divorce from her in the courts of another State after the execution of the conveyance, does not, if admissible in evidence at all, overcome the presumption that the wife had prior to her second marriage obtained a divorce. *Ib.*

MARRIED WOMAN.

See CONVEYANCE, 1 to 3; HUSBAND AND WIFE; MORTGAGE, 3.

1. *Separate Real Estate.—Conveyance to Husband.—Mortgage.—Contract of Suretyship.—Estoppel.*—Where a wife transfers her separate real estate to her husband, by conveyances importing a money consideration, for the purpose of enabling him to mortgage it, as his property, to secure a loan for his own benefit, she will be estopped, as against a mortgagee who is not shown to have had knowledge that the conveyances were a mere contrivance to evade the statute (section 5119, R. S. 1881) prohibiting her from entering into contracts of suretyship, from asserting that the transfer was not *bona fide*. *Long v. Crosson, 3*
2. *Married Woman.—Consideration.—Judgment.—Estoppel.*—Where a mortgage, executed by a married woman upon her separate land to secure her husband's debt, is foreclosed in a proceeding to which she is a party, and the land ordered sold, she can not afterwards, in a collateral proceeding, question the consideration upon which the mortgage rested. *Watson v. Camper, 60*
3. *Mortgage.—Suretyship.—Land Held by Entireties by Husband and Wife.*—To bring a mortgage, executed by a husband and wife upon land owned by them as tenants by entireties, to secure a loan of money made upon their joint application, within the prohibition of section 5119, R. S. 1881, making the wife's contracts of suretyship void, it must affirmatively appear that the money received did not enure to the benefit of the wife, or to the benefit of the joint estate.

*Security Company v. Arbuckle, 69*

4. *Same.—Insufficient Finding of Wife's Suretyship.*—A finding that the money received on the mortgage was used by the husband "mainly in discharging his indebtedness upon which his wife was surety," and that he "recognized all the debts paid with the money as his individual debts, upon which his wife was only surety," does not constitute a sufficient finding of the fact of the wife's suretyship. *Ib.*

#### MASTER AND APPRENTICE.

See APPRENTICE.

#### MASTER AND SERVANT.

1. *Boy.—Character of Work to be Required of.—Legal Implication.*—Where a boy, without experience, is employed to perform labor, the character of the service to be required of him by the master is implied to be such as is within his capacity. *Brazil Block Coal Co. v. Gaffney, 455*
2. *Same.—Instruction and Warning.—Liability of Master for Injury.*—If a boy, without being instructed or cautioned, is set to perform a service of which, on account of his immature age, he is incapable of appreciating the hazards, although visible; or if, being instructed and cautioned, his mind and strength are yet so immature that he is not capable of availing himself of the instruction and warning or of safely performing the service, the master is liable for injuries sustained by him. *Ib.*
3. *Same.—Coal Mine.—Requiring Boy to Assist in Coupling Coal-Cars.*—Where a boy, ten years of age, employed by a coal mining company and assigned to work within his capacity at the top of the mine, is, without being instructed or cautioned, ordered by the person having control of the workmen at the top of the mine, or by a workman with the knowledge and consent of such person, to quit his regular work and assist in switching and coupling coal cars, which he does, believing it his duty to obey, and while so engaged is injured, the master is liable. *Ib.*
4. *Same.—Compulsion.—Complaint.—Demurrer.—Motion to Make Specific.*—Where it is alleged that the plaintiff was "compelled" to do the act resulting in his injury, an objection that the facts constituting the compulsion are not stated can not be reached by demurrer, but only by a motion to make the complaint more specific. *Ib.*
5. *Same.—Jury to Determine What Constitutes Compulsion.*—As to what would amount to compulsion where a boy ten years old is required, by men having authority to direct him, to perform a dangerous service, is a question for the jury. *Ib.*

#### MEASURE OF DAMAGES.

See CONTRACT, 6; RAILROAD, 7; SALE, 2.

#### MERGER.

See COMMON CARRIER, 1; CONTRACT, 1 to 3.

#### MISTAKE.

See DEED, 1 to 3, 6, 7.

#### MORTGAGE.

See CHATTEL MORTGAGE; CONTRACT, 12; CORPORATION; DECEDENTS' ESTATES, 9, 10; MARRIED WOMAN; REAL ESTATE, 13; WIDOW, 4.

1. *Foreclosure.—Parties.—Assignee in Bankruptcy.—Void Sale.—Satisfaction of Judgment.*—Where a mortgagor becomes bankrupt and conveys his property, including that described in the mortgage, to an assignee, the latter is a necessary party to a suit to foreclose the mortgage, and a sale under a decree given in a suit to which he is not a



party is void, does not satisfy the judgment, and is not a bar to an action thereon. *Griffin v. Hodshire, 235*

2. *Foreclosure.—Disputed Ownership.—Judgment on Pleadings.*—Where, in a suit to foreclose a mortgage, the mortgagor brings the amount due into court, the plaintiff is not entitled to a judgment on the pleadings against him until an issue joined between the plaintiff and another defendant as to the ownership of the mortgage is determined.

*Doyal v. Landes, 479*

3. *Release.—Substitution.—When Lien Continues.—Married Women.—Inchoate Interest.—Judicial Sale.*—Where a mortgagee, in order to enable a mortgagor to renew a first mortgage held by a third person and give it its proper priority as a lien, cancels his mortgage and takes a new one to secure the same notes, he does not thereby release the lien created by his original mortgage, and the intervention of the act of March 11th, 1875, vesting the inchoate interests of married women upon judicial sales of their husbands' property, does not affect his rights.

*Pouder v. Ritzinger, 597*

### MUNICIPAL CORPORATION.

See MANDAMUS, 6; NEGLIGENCE, 1 to 5.

1. *Street Improvements.—Injury to Property-Owner by Water.—Liability of Corporation.*—A municipal corporation is liable in damages if it collects water in an artificial channel and pours it upon the land of another; but it is not liable for consequential damages caused by the grading and improvement of its streets, unless the work be negligently performed. *Davis v. City of Crawfordsville, 1*
2. *City.—Drainage.—Nuisance.—Special Injury.*—Where a city constructs an open ditch upon a street, so near to a plaintiff's lot as to cause portions thereof to fall into the ditch, and so as to deprive him of access to his residence, and to affect the healthfulness of his property by causing filthy water and sewerage to become stagnant adjacent thereto, it is liable in damages. *City of Seymour v. Cummins, 148*
3. *Same.—Defective Plan.—Liability of City.*—If a city adopts a proper plan of drainage and lets a contract for the doing of the work, the contractor to use his own methods and means for the construction of the drain, the city is not liable for damages resulting from the contractor's negligence; but if the city adopts a defective plan, and the work is constructed according thereto and a special injury results to a property-owner by reason of negligence in devising the plan, the city is liable. *Ib.*
4. *Same.—Damages Accrue to Owner of Real Estate at Time of Injury.—Subsequent Conveyance.—Effect upon Right of Action.*—In such case the damages accrue to the person who owns the property at the time of the injury, and his right to maintain an action therefor is not affected by the fact that he parts with the title to the real estate after the commencement of the action. *Ib.*
5. *City.—Public Bridge.—Duty to Repair.—Liability for Injury.*—It is the duty of a city, in this State, to keep a public bridge, within its limits and of which it takes control, in repair, although such bridge may have been originally built and maintained by the county as part of a public highway, and its failure to do so renders it liable to one who suffers injury without contributory negligence. *City of Goshen v. Myers, 196*
6. *Same.—County Bridge.—Acceptance by City.*—A bridge constitutes part of the highway upon which it is situate, and a city, by taking charge of and improving the highway, accepts and becomes charged with the maintenance of a bridge constructed thereon by the county. *Ib.*

7. *Common Council.—Power to Remove Officers.*—The common council of a city has power to remove a corporate officer, for neglect or violation of duty, whether such officer be elected by that body or by the people. *Muhler v. Hedekin, 481*
8. *Same.—Water-Works Trustees.—Charges Against.—Power to Investigate.*—The common council has power to entertain and inquire into the truth of charges of malfeasance in office, preferred against trustees of the water-works, and to remove any or all of these officers for cause shown. *Ib.*
9. *Same.—Injunction.—When will not be Issued.*—It is not within the jurisdiction of a court of equity to enjoin the common council of a city from proceeding to hear and investigate charges preferred against water-works trustees, or other municipal officers, and from removing them from office. *Ib.*
10. *Same.—Common Council not a Judicial Body.*—A common council is not a judicial body, and in the examination of charges preferred against a municipal officer, with a view to determine whether he shall be removed, and in removing him, it does not act judicially in such a sense as to subject its proceedings to the jurisdiction of a court of chancery, either by way of prohibition or injunction. *Ib.*

## MURDER.

· See CRIMINAL LAW, 1 to 3, 13 to 15.

## NEGLIGENCE.

See FRAUD, 1; GUARDIAN AND WARD; HIGHWAY; MASTER AND SERVANT; PARENT AND CHILD; PLEADING, 5, 9; RAILROAD; TENANTS IN COMMON, 3, 4.

1. *Damages.—Broken Leg.—Second Surgical Operation.—Suffering and Deformity.*—In an action against a city to recover damages for a broken leg caused by a defective sidewalk, it is proper to show that on account of the nature of the injury, which is described, it became necessary during the treatment of the limb to break and reset the bones after the first operation was performed, that the treatment was necessary and skilful under the circumstances, and that the suffering endured by the plaintiff and the deformity of the limb were the results of the injury. *City of Goshen v. England, 368*
2. *Same.—Character of Fracture.—Testimony of Surgeon.*—A surgeon who has examined an injury may testify as to the character of the fracture and as to what bones were broken. *Ib.*
3. *Same.—City.—Defective Sidewalk.—Notice of.—Prior Accidents to Other Persons.*—Evidence that other persons, prior to the accident to the plaintiff, had stepped into the hole in the sidewalk which caused the injury sued for, is competent as tending to show that the city had notice of the dangerous condition of the walk. It is also proper to show that the defect was afterwards repaired. *Ib.*
4. *Same.—Attending Physician.—Statements in Absence of Patient.*—A physician may not testify as to statements made to him, in the absence of the plaintiff, by the latter's attending physician, concerning the character of the injury suffered by the plaintiff. *Ib.*
5. *Same.—Aggravation of Injury by Plaintiff's Negligence.—Reduction of Damages.—Burden of Proof.*—Where, in an action to recover for a personal injury, the plaintiff shows the receipt of the injury, and that it was caused by the negligence of the defendant, without contributory negligence on his part, the burden is then upon the defendant to show, if such is the fact, that the injury was aggravated by the plaintiff's negligence in its treatment, and if such fact is established it merely goes



to a reduction of the damages in proportion to the negligent aggravation. *Ib.*

6. *Proximate Cause*.—If an injury results from a negligent act of a defendant, such act will be deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care.  
*Louisville, etc., R. W. Co. v. Lucas, 583*

#### NEW TRIAL.

See CRIMINAL LAW, 12; PRACTICE, 1; SUPREME COURT, 1, 2.

1. *Practice.—Separate Motions For*.—A party filing a motion for a new trial must include all the grounds upon which he relies in one motion; they can not be separated and a separate motion filed for each cause assigned.  
*Moon v. Jennings, 130*
2. *Affidavits.—Practice*.—The finding of the trial court upon an issue of fact presented by affidavits and counter-affidavits filed in support of a motion for a new trial, is binding upon the Supreme Court.  
*Schnurr v. Stults, 429*
3. *Same.—Newly Discovered Evidence.—Diligence*.—It is not enough that one who asks a new trial on the ground of newly discovered evidence shall aver in general terms that he exercised diligence; the particular acts of diligence must be shown. *Ib.*
4. *Same.—Cumulative Evidence.—Change of Result*.—A new trial will not be granted where the newly discovered evidence is cumulative, or where it is not shown that the new evidence would probably change the result. *Ib.*

#### NOTICE.

See INSURANCE, 14, 15; NEGLIGENCE, 3; RECEIVER, 2; TOWNSHIP TRUSTEE, 3, 5; WITNESS, 2.

#### NUISANCE.

See MUNICIPAL CORPORATION, 2.

#### NUNC PRO TUNC ENTRY.

See COSTS, 1.

#### OBSTRUCTION OF HIGHWAY.

See HIGHWAY; RAILROAD, 12.

#### OFFICE AND OFFICER.

See BENEVOLENT INSTITUTIONS; CONSTITUTIONAL LAW; MUNICIPAL CORPORATION, 7 to 10.

#### PARENT AND CHILD.

See APPRENTICE, 2.

*Wrongful Death of Child.—Damages.—Right of Action*.—A guardian has no right of action for the wrongful death of his infant ward, except to reimburse the ward's estate for expenditures which he has been required to make for care and medical attendance and funeral expenses, the right of action for general damages for loss of services, etc., being in the father or mother. Section 266, R. S. 1881.

*Louisville, etc., R. W. Co. v. Goodykoontz, 111*

#### PARTIES.

See DECEDENTS' ESTATES, 3, 5, 7; MORTGAGE, 1; PLEADING, 2, 7; PRACTICE, 4; PROMISSORY NOTE, 1; REPLEVIN, 3; SHERIFF'S SALE, 1; SURVIVAL OF CAUSE OF ACTION, 1.

## PARTITION.

See REAL ESTATE, 6.

*Title.—Estoppel.*—Ordinarily the title to land is not in issue in a suit for partition, but the pleadings may be so drawn as to put it in issue; and where the plaintiff sets out his title at length, and the manner in which he acquired it, and the quantity claimed is set off to him by the court, the defendants are estopped by the decree to afterwards assert any interest therein. *Watson v. Camper*, 60

## PARTNERSHIP.

*Mortgage of Firm Property to Secure Individual Debt.*—A chattel mortgage executed by insolvent partners, upon all the firm property, to secure the individual debt of one partner, is valid, if made in good faith and with no intent to defraud partnership creditors.

*Purple v. Farrington*, 164

## PAYMENT.

See EVIDENCE, 1.

## PENALTY.

See REPLEVIN, 5; SURVIVAL OF CAUSE OF ACTION; TAXES, 3 to 6.

## PERSONAL PROPERTY.

See SALE; TENANTS IN COMMON, 3, 4.

## PHYSICIAN AND PATIENT.

See NEGLIGENCE, 2, 4; WILL, 8.

## PLEADING.

See CONVERSION; CONVEYANCE, 4; DRAINAGE, 1; FRAUDULENT CONVEYANCE; HIGHWAY; INSURANCE, 2; MASTER AND SERVANT, 4; PRACTICE; PROMISSORY NOTE, 5; RAILROAD, 12, 13; REAL ESTATE, 2; REPLEVIN, 3; SHERIFF'S SALE, 1; SUPREME COURT; TAXES, 6; WILL, 12; WITNESS, 2.

1. *Special Denial.—Demurrer.*—A paragraph of answer which pleads facts in negation of the material facts alleged in the complaint, is a special denial and is good on demurrer. *Hostetter v. Auman*, 7
2. *Death of Party.—Amendment of Complaint.—Curable Defect.*—Where, upon the death of the defendant, the complaint is not amended so as to aver his death and the appointment of an administrator, but the administrator appears and answers, the defect in the pleading is a mere informality and not, under section 658, R. S. 1881, available for the reversal of the judgment. *Simons v. Busby*, 18
3. *Complaint.—Theory.—Must be Good as to all Plaintiffs*—A complaint must proceed upon some definite theory, and must state facts sufficient to constitute a good cause of action in favor of all who join as plaintiffs, upon the theory on which it proceeds. *Peters v. Guthrie*, 44
4. *Motion to Strike Out Parts of.—Practice.*—There is no available error in overruling a motion to strike out parts of a complaint. *Lawrenceburgh, etc., Co. v. Hinke*, 47
5. *Complaint.—Negligence.*—A complaint charging the defendant with negligence, whereby the plaintiff, without his fault, sustained great bodily injuries, is good on demurrer. *Ib.*
6. *Answer.—Demurrer.—Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of answer where the same facts are provable under another paragraph, or where the paragraph to which the demurrer is sustained is merely a special denial. *Ib.*
7. *Complaint.—Defect of Parties.—Demurrer.*—A demurrer for a defect of

parties does not question the sufficiency of the complaint to state a cause of action in favor of all the persons who are joined as plaintiffs. *Evans v. Schaefer*, 49

8. *Amendment.—Waiver of Exceptions.*—Where a defendant, after a demurrer has been sustained to his answer, obtains leave to amend, and files another answer, he thereby waives the exceptions taken on the original pleading. *Johnson v. Conklin*, 109
9. *Negligence.—Facts Constituting.*—A failure to state, in detail, the facts constituting negligence, does not render a complaint bad on demurrer. *Louisville, etc., R. W. Co. v. Cauley*, 142
10. *Answer.—Demurrer.*—There is no error in sustaining a demurrer to a paragraph of answer where the facts pleaded therein are admissible in evidence under the general denial, which is pleaded. *City of Seymour v. Cummins*, 148
11. *Attachment.—Failure to Answer.—Waiver.*—Where an attachment plaintiff goes to trial without requiring an answer to be filed to the complaint in discharge of a rule, the complaint is not confessed by the defendant, but the filing of an answer will be considered as waived by the plaintiff and the case will be determined as though an answer had been filed. *Purple v. Farrington*, 164
12. *Action Originating Before Justice of Peace.—Complaint.—Motion in Arrest.*—A complaint, in an action originating before a justice of the peace, which avers that the defendant "justly owes the plaintiff sixty-three and 21-100 dollars, and that the payment of the said sum has been unreasonably delayed, and that there is the further sum of eleven and 26-100 dollars as interest on the same," is good on a motion in arrest of judgment in the circuit court. *Smith v. Heller*, 212
13. *Answer in Confession and Avoidance.*—An answer in confession and avoidance is not bad for failing to confess the cause of action precisely as it is alleged; it is sufficient if it confess a *prima facie* cause of action. *Cooper v. Smith*, 313
14. *Answer.—Exhibit.*—A deed which is filed as an exhibit with an answer, but which is not the foundation of the defence pleaded, is not a part of the answer, and can not be looked to in determining its sufficiency. *Platt v. Brickley*, 333
15. *Reply.—References to Exhibit.*—Where the substantive averments of a reply consist of references to an exhibit filed with the answer, but constituting no part thereof, the reply is bad. *Ib.*
16. *Uncertainty.—Motion to Make Specific.—Demurrer.*—Mere uncertainty in the allegations of a pleading is a defect which can not be reached by demurrer, the remedy being by a motion to make more specific. *Cleveland, etc., R. R. Co. v. Wynant*, 539

#### POLICE POWER.

See INTOXICATING LIQUOR.

#### POOR.

See APPRENTICE.

#### PRACTICE.

See ARGUMENT OF COUNSEL, 1; BILL OF EXCEPTIONS; BURDEN OF PROOF; CIRCUIT COURT; EVIDENCE, 2 to 4; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; NEW TRIAL; PLEADING; SUPREME COURT; VERDICT.

1. *New Trial.—Amount of Recovery.—Supreme Court.*—No question as to the amount of the recovery is presented to the Supreme Court unless it is assigned as a cause for a new trial.

*Thickstun v. Baltimore, etc., R. R. Co.*, 26

2. *Pleading.—Motion to Strike Out.*—A motion to strike out another motion to strike out is improper, and should not be entertained.  
*White v. D. S. Morgan & Co., 338*
3. *Objections to Evidence.—Must be Specific.*—Objections to the admission of evidence, to be available on appeal, must be specific.  
*Metzger v. Franklin Bank, 359*
4. *Parties.—Admission on Application.—Rights of.—Query,* whether one who is made a party to an action on his own application, and who is not a necessary party to a complete determination of the same, can have any standing in court except by a cross-action asking affirmative relief.  
*Studebaker Bros. Mfg. Co. v. Bird, 427*
5. *Arrest of Judgment.*—Where the court has acquired jurisdiction of the parties, and has jurisdiction of the subject-matter, judgment will not be arrested if the complaint contains one good paragraph.  
*Lange v. Dammier, 567*
6. *Verification of Pleading.—Waiver of Objection.*—An objection on account of a failure to verify a pleading is waived unless made before entering upon the trial, and is therefore not presented by a motion in arrest of judgment.  
*Ib.*

## PREFERENCE OF CREDITOR.

See ATTORNEY AND CLIENT; CHATTEL MORTGAGE, 3, 5.

## PRESCRIPTIVE RIGHT.

See CANALS.

## PRESUMPTION.

See CONSTITUTIONAL LAW, 9, 11; HUSBAND AND WIFE, 1; INTERROGATORIES TO JURY, 2; JUDGMENT, 4; JUROR, 3; LAW OF OTHER STATE; MARRIAGE; RAILROAD, 14; SHERIFF'S SALE, 2; STATUTE, 2; SUPREME COURT, 1; WILL, 4.

## PRINCIPAL AND AGENT.

See CONTRACT, 12; INSURANCE, 11, 12; SALE.

## PRINCIPAL AND SURETY.

See CONTRACT, 5, 6; MARRIED WOMAN.

1. *Administrator's Bond.—Execution of.—Signing in Expectation that Others will Sign.*—Where persons, upon being requested by the principal obligor to become co-sureties with other named persons in an administrator's bond, go to the clerk's office and find the bond in the custody of the clerk, already filled out, with the names of the other proposed sureties written in the body thereof, whereupon, without making inquiry or explanation, but expecting the bond to be signed by the other persons, they sign it and leave it with the clerk, who approves it on the same day, without further signatures, the bond is a valid and binding obligation upon the persons who so sign it.  
*State, ex rel., v. Gregory, 503*
2. *Same.—Debt Due Estate from Administrator.—Failure to Account for.—Insolvency as Defence to Action on Bond.*—Where a person at the time of his appointment as administrator is indebted to the estate, he should inventory and charge himself with the debt; but if he fails to account for the same, his sureties are not liable, if they show that he was insolvent, beyond the amount that could have been saved to the estate by the exercise of diligence.  
*Ib.*
3. *Same.—Failure of Administrator to Make Inventory.*—The failure of an administrator to make an inventory of a claim due from him to the estate is not material to the liability of his sureties, unless actual damage resulted therefrom.  
*Ib.*

PRIVILEGED KNOWLEDGE.

See WILL, 8.

PROMISSORY NOTE.

See CHATTEL MORTGAGE, 2; WILL, 5.

1. *Real Party in Interest.—Estoppel.*—The maker of a promissory note is estopped from showing that the payee was not the real party in interest at the time the note was executed. *Johnson v. Conklin, 109*
2. *Indemnity.—Loss Essential to Liability.*—A promissory note which is executed merely to indemnify the payee against loss for money advanced for the maker as margins in a joint transaction by the parties in grain, is not enforceable by the payee if no loss occurs. *Davis v. Davis, 511*
3. *Same.—Transaction in Grain.—Retention by Payee of Maker's Profits.*—Where, in a joint transaction in grain, one party advances for the other the amount of money necessary to make the purchase, and takes the latter's note to indemnify him against loss, it being agreed that in case of a profit the payee shall collect the maker's share and apply it upon the note, the note is not enforceable by the payee if the maker's share of the profits collected and retained by him is equal to the amount due on the note. *Ib.*
4. *Same.—Sale of Commodity.—Margins.—Gambling Contract.*—Where it is mutually understood and intended by all the parties to a contract that the commodity said to be sold is neither to be delivered nor paid for, but the contract is to be settled by the seller or purchaser, according as the market shall decline or advance, paying the difference between the contract price and the market price, such contract is a gambling contract and void, and a promissory note executed in the course of such a transaction to indemnify the payee against loss for money advanced for the maker as margins, is not enforceable by the payee. *Ib.*
5. *Same.—Pleading.—Reply.*—In an action by the payee upon a promissory note which the defendant asserts (1) was given to indemnify the plaintiff against loss for money advanced in a transaction in grain, which had resulted profitably, and that the defendant's share of the profits, which the plaintiff had collected and retained, amounted to more than the note, and (2) that the note evidences money advanced by the plaintiff for the defendant in a gambling transaction in grain, a reply that the note was given for money loaned, that the transaction in grain was subsequent to and wholly unconnected with the execution of the note, and that the plaintiff had accounted to the defendant for all profits accruing to him in said transaction, is good. *Ib.*
6. *Same.—Settlement.*—A settlement prior to the maturity of a note of all other business matters between the maker and payee, can not make the note enforceable if it is void as being the outgrowth of an illegal gaming contract. *Ib.*

PUBLIC BRIDGE.

See COUNTY COMMISSIONERS, 5, 6; MUNICIPAL CORPORATION, 5, 6.

PUBLIC IMPROVEMENTS.

See MUNICIPAL CORPORATION, 1 to 4.

PUBLIC SCHOOLS.

See TOWNSHIP TRUSTEE.

PUBLIC USE.

See CANALS.

## QUIETING TITLE.

See TENANTS IN COMMON, 2; WILL, 10.

## RAILROAD.

See COMMON CARRIER.

1. *Injury to Animals.—Farm Crossing.—Negligence.*—In the absence of negligence on its part, a railroad company is not liable for injuring animals which enter upon its track at a private farm crossing.  
*Louisville, etc., R. W. Co. v. Etzler, 39*
2. *Same.—Finding as to Character of Crossing.*—A finding that animals entered upon the railroad track "at a point where the railroad crosses a cartway, or private way, known as McQuiddy's Crossing," is equivalent to a finding that the entrance was effected at a private farm crossing.  
*Ib.*
3. *Deed.—Right of Way.—Easement.*—A deed releasing and quitclaiming to a railroad company "the right of way for so much of said railroad, being eighty feet wide, as may pass through the following described land," etc., conveys merely an easement, the fee remaining in the grantor.  
*Cincinnati, etc., R. W. Co. v. Geisel, 77*
4. *Same.—Character and Extent of Estate Acquired.—Contract.*—Where a railroad company acquires an estate in land for the use of its tracks by contract with the owner and not by proceedings under the right of eminent domain, the character and extent of the estate are to be determined by the contract, and are not affected by charter provisions authorizing it to acquire a greater estate than that contracted for.  
*Ib.*
5. *Right of Way.—Injunction.—Ejectment.—Estoppel.—Assessment of Damages.*—A land-owner who stands by, without demanding compensation, until a railroad is in operation and the public interests are involved, can neither enjoin the company nor maintain ejectment proceedings, his only remedy being a proceeding for the assessment of damages.  
*Louisville, etc., R. W. Co. v. Beck, 124*
6. *Right of Way.—Width.—Contract.—Evidence.—Acts and Declarations of Parties.*—Where a railroad company acquires a right of way by contract with a land-owner, and the width of the land granted for such right of way is not fixed by the contract, the declarations and acts of the parties are admissible in evidence to fix such width  
*Indianapolis, etc., R. R. Co. v. Lewis, 218*
7. *Agreement to Build Fences.—Measure of Damages.*—For the breach of a contract by a railroad company with a land-owner to fence its right of way, the cost of erecting the fence, and also special damages for animals killed, for damage done by trespassing animals, and for the loss of pasturage, may be recovered.  
*Louisville, etc., R. W. Co. v. Power, 269*
8. *Negligence.—Accumulation of Combustible Material on Right of Way.—Destruction of Adjoining Property.*—If a railroad company negligently permits grass and other combustible matter to accumulate upon its right of way, and fire, emitted from one of its passing locomotives, falls upon and ignites such combustible matter and from thence spreads to the land of an adjoining proprietor and destroys his property, without any fault on his part, it is liable for the loss sustained.  
*Louisville, etc., R. W. Co. v. Hart, 273*
9. *Same.—Adjoining Proprietor.—Not Bound to Keep Grass Burned off his Premises.*—A person owning land adjoining a railroad is not bound to keep the grass burned off of his land between his hay-stacks and the right of way, and his failure to do so does not constitute negligence.  
*Ib.*

10. *Public Crossing.—Animals.—Contributory Negligence of Owner.*—Where the owner of animals permits them to run at large, unattended, in the vicinity of a railroad crossing, he is guilty of contributory negligence which will defeat an action for their negligent killing by a passing train, notwithstanding an order of the board of county commissioners allowing cattle to run at large.  
*Hanna v. Terre Haute, etc. R. R. Co., 316*
11. *Same.—When Railroad Company Not Negligent.—Wilful Injury.*—If the statutory signals are given, and reasonable efforts made, in the customary manner, to frighten away animals which are seen upon a public crossing, the railroad company has done all it is required to do, so far as the owner of the animals is concerned. To make it liable, an actual or constructive intent to commit the injury must be alleged and proved. *Ib.*
12. *Leaving Cars in Highway.—Frightened Horses.—Liability for Injury Caused by.—Complaint.*—A complaint against a railroad company for damages caused by the plaintiff's horses taking fright at cars alleged to have been "unlawfully, carelessly and negligently placed upon a public highway," is not bad on demurrer for failing to allege that the cars were permitted to remain upon the highway an unreasonable time.  
*Cleveland, etc., R. R. Co. v. Wynant, 539*
13. *Personal Injury.—Complaint.—Motion to Make Specific.*—Where a complaint against a railroad company to recover for personal injuries alleges that the injuries were caused by the defendant suddenly and greatly increasing the speed of its train while the plaintiff was in the act of stepping off at a depot platform, it is not error to overrule a motion to make the complaint more specific by stating what agent or employee, and what acts of such agent or employee, caused the sudden increase of speed.  
*Louisville, etc., R. R. Co. v. Crunk, 542*
14. *Same.—Alighting from Moving Train.—Negligence.*—There is no conclusive legal presumption that one who voluntarily alights from a moving train is guilty of such negligence as will defeat an action for injuries, but the question as to whether the act constitutes negligence is to be determined by the jury upon a consideration of the rate of speed the train had acquired, the place, and all the circumstances connected with the act of alighting. *Ib.*
15. *Same.—Sick Passenger.—Carrying into Train.—Obligation of Company to Assistants.—Opportunity to Alight.*—Where a passenger is so sick and enfeebled as to make it necessary for assistants to carry him from the station to a seat in the train upon which he has secured passage, the railroad company, having contracted to carry him with knowledge of his condition, is bound to allow him the required assistants, and is under an obligation to stop the train long enough to afford the persons aiding such passenger, although their services are voluntarily offered, a reasonable opportunity to leave the train, the same as if they were passengers. *Ib.*
16. *Same.—Sudden Increase of Speed.—Injury to Person Alighting.*—Where one enters a train at a station to assist in carrying into a car a sick passenger whom the railroad company has contracted to carry, and while in the car the train is started before he has had a reasonable time to get off, yet at a rate of speed so slow as to enable him to alight in safety, but after he has reached the platform of the car and is in the act of alighting the speed is so suddenly and greatly increased, through the negligence of the trainmen, as to throw him off and injure him, the company is liable. *Ib.*
17. *Duty to Passengers.—Must Provide Safe Alighting Places.*—It is the duty of a carrier of passengers to provide and maintain safe alighting



places, and for a negligent breach of this duty it is liable to a passenger who sustains injury without his fault.

*Louisville, etc., R. W. Co. v. Lucas, 583*

18. *Same.—Platforms and Stations.—Lights.*—A railroad company is bound to keep the platforms at its stations in a safe condition, and if passengers are discharged after dark it must provide lights. *Ib.*
19. *Same.—Defective Platform.—Injury to Passenger.—Concurring Negligence of Third Party.*—Where a railroad company discharges a passenger in the night-time at the crossing of another railroad, where the stations of the two companies are connected by an unlighted platform, so constructed as to lead the passenger to believe that it is designed for the use of travellers in passing from one station to the other, and the passenger, in going from the station where he alighted to the other station, and exercising care, falls through an unguarded hole in the platform and is injured, the carrier is liable, although the negligence of the other company concurred in causing the injury. *Ib.*
20. *Same.—Proximate Cause.*—If an injury results from a negligent act of a defendant, such act will be deemed the proximate cause, unless the consequences are so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. *Ib.*

#### RATIFICATION.

See CONTRACT, 12; CONVEYANCE, 3.

#### REAL ESTATE.

See CANALS; CONTRACT, 12; CONVEYANCE; DECEDENTS' ESTATES, 1 to 3, 5 to 7; DEED; DESCENT; LANDLORD AND TENANT; MARRIED WOMAN; MUNICIPAL CORPORATION, 1 to 4; PARTITION; RAILROAD, 3 to 6; SEDUCTION, 5; SHERIFF'S SALE; TENANTS IN COMMON; WASTE; WIDOW; WILL, 6, 9.

1. *What Constitutes Adverse Possession.*—An entry upon land with the intention of asserting ownership to it, and continuing in the visible and exclusive possession under such claim, exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission and in disregard of all other conflicting claims, is sufficient to make the possession adverse, and if continued for twenty years is equivalent to a grant. *Collett v. Board, etc., 27*
2. *Action to Recover.—Complaint.—Judgment for Possession.—Absence of Prayer for.*—A judgment may be rendered for the possession of real estate, where the facts pleaded and proved entitle the plaintiff to that relief, although the complaint contains no specific prayer for possession. *Evans v. Schafer, 49*
3. *Tenants in Common.—Adverse Possession.—Ouster.*—Occupancy of the whole estate for twenty years, under color and claim of title, by one tenant in common, constitutes an ouster of his co-tenant and gives title to the whole. *English v. Powell, 93*
4. *Same.—Possession under Invalid Tax Deed.*—Possession of land under a deed given upon a sale for taxes is adverse, though the title under the deed may be invalid. *Ib.*
5. *Same.—Purchase by Tenant in Common at Tax Sale.*—A tenant in common, in possession of the whole property, can not acquire his co-tenant's title by a purchase at a sale for taxes which he has permitted to go delinquent; but adverse possession under a tax deed for twenty years will give title. *Ib.*
6. *Same.—Partition.—Rents and Profits.—Tax Sale.—Adverse Possession.*—To a complaint for partition and for an accounting for use and occu-



- pation, an answer alleging that the interest asserted by the plaintiff had been sold for taxes more than twenty years before the bringing of the suit, but failing to show that possession was taken under the sale and held for twenty years, is bad. *Ib.*
7. *Same.—Land Sold for Taxes.—Action to Recover.—Limitation.*—Section 250, 1 R. S. 1876, p. 127, providing that no action for the recovery of real property sold for taxes shall be brought after five years from the date of the sale, has no application to a suit for partition or to recover for use and occupation and for damages for waste. *Ib.*
  8. *Action to Recover.—Sheriff's Sale.—Widow's Inchoate Interest.—Estoppel.—Title.*—In an action by a surviving wife to recover possession of an undivided one-third of land sold on execution against her husband, the sheriff's sale is not conclusive upon the defendant as to the execution debtor's title, in the absence of a showing that possession was taken and title asserted thereunder, and he may show an independent chain of title back to an admitted former owner. *Wright v. Tichenor*, 104 Ind. 185, distinguished. *Shockley v. Starr*, 172
  9. *Parol Contract to Convey.—Heirs.—Creditors.*—A parol agreement for the conveyance of land, if valid between the parties, can not be successfully assailed by their heirs or grantees, even if fraudulent as to creditors. *Wilson v. Campbell*, 286
  10. *Same.—Adverse Possession.—Title.*—Adverse possession for twenty years, under claim and color of right, gives a perfect legal title in fee simple, without regard to the occupant's reasons for not taking a conveyance. *Ib.*
  11. *Same.—Purchaser.—Inquiry.*—One who buys real estate with knowledge that a third person is in possession, is put upon inquiry as to the rights of the latter. *Ib.*
  12. *Same.—Character of Possession.*—A purchaser has no right to suppose that a son is in possession as heir, when the latter's possession began many years before the father's death. *Ib.*
  13. *Mortgage.—Description.—Words Expressing Quantity.*—A mortgage contained a description of a part of lot 10, block 37, in the city of Indianapolis, the metes and bounds given making 45 feet and 6 inches on Delaware street, by 163 feet and 7 inches in depth. It also included other ground, described as "also, fourteen feet and six inches (14 ft. 6 in.) off the south side of lot eleven (11) in said square thirty-seven (37), of the city of Indianapolis, being in all sixty (60) feet front on Delaware street, by one hundred and sixty-three feet and six inches in depth." Lot 11 was, in fact, 196 feet in depth. The mortgage was foreclosed and the land sold, the description as given being carried through all the proceedings.
- Held*, that the words italicised are not words of description, qualifying the preceding words, but words expressing quantity merely, and that a strip of ground off the south side of lot eleven 14 feet and 6 inches wide by 196 feet in depth passed by the mortgage and sale. *Maguire v. Bissell*, 345

## RECEIVER.

1. *Appointment of.—Replevin.—Non-Residence.*—The circuit court may appoint a receiver of personal property within its jurisdiction and involved in a pending action, although the defendant may reside in another State. *Hellebush v. Blake*, 349
2. *Same.—Pending Action.—Defective Notice.*—There may be a pending action, so as to authorize the appointment of a receiver, although the notice or service is defective. *Ib.*
3. *Same.—Special Appearance.*—A special appearance, made for the pur-

pose of moving to quash the notice, constitutes a step in a pending action. *Ib.*

4. *Same.—Power of Appointment.*—Section 1270, R. S. 1881, does not determine the right of the court to appoint a receiver in actions of replevin, but such section must be taken in connection with section 1222, which authorizes the appointment of a receiver, without regard to the form of the action, wherever justice requires it. *Ib.*

#### RECOGNIZANCE-BOND.

See APPEAL, 2; CONTRACT, 5, 6.

#### REDEMPTION.

See SHERIFF'S SALE, 1.

#### REFORMATION OF INSTRUMENT.

See DEED, 2.

#### REMOVAL OF OFFICER.

See MUNICIPAL CORPORATION, 7 to 10.

#### RENTS AND PROFITS.

See REAL ESTATE, 6.

#### REPLEVIN.

See CHATTEL MORTGAGE, 2; LANDLORD AND TENANT, 1; RECEIVER; SALE, 2.

1. *Justice of Peace.—Appeal.—Verdict.—Surplusage.*—A verdict in an action of replevin originating before a justice of the peace, is not contrary to law merely because the jury found the value of the property in controversy, as such finding will be treated as surplusage. *Van Meter v. Barnett, 35*
2. *Same.—Return of Property.—Form of Verdict and Judgment in Circuit Court.*—Upon the trial in the circuit court of an action of replevin which originated before a justice of the peace, the verdict, if for the defendant, should be merely for the return of the property delivered by the constable to the plaintiff, and an alternative judgment that the defendant recover the value of the property, in case a return can not be had, is erroneous. R. S. 1881, sections 1550 and 1571. *Ib.*
3. *Replevin Bond.—Action upon.—Complaint.—Defect of Parties.*—Where a complaint upon a replevin bond by one of two obligees alleges that the obligee who is not joined as plaintiff has no interest in the action, a demurrer for defect of parties plaintiff is not well taken. *Kellar v. Carr, 127*
4. *Same.—Costs.—Right to Recover.*—In an action upon a replevin bond the plaintiff is entitled to recover the costs made by him and for which he became liable in the replevin proceedings, but he is not entitled to recover the costs made by the adverse party. *Ib.*
5. *Same.—Recovery Limited by Penalty.*—The recovery upon a replevin bond can not exceed the penalty of the bond, and a judgment for more is erroneous. *Ib.*

#### REPORTER OF SUPREME COURT.

See SUPREME COURT REPORTS.

#### RESCISSION OF CONTRACT.

See CONTRACT, 9.

#### RES JUDICATA.

See COUNTY COMMISSIONERS, 2; DECEDENTS' ESTATES, 7; JUDGMENT, 9; WILL, 1, 3.

REVIEW OF JUDGMENT.

See JUDGMENT, 7; SUPREME COURT, 5.

RIGHT OF ACTION.

See APPRENTICE, 2; GUARDIAN AND WARD; MUNICIPAL CORPORATION, 4; PARENT AND CHILD; TENANTS IN COMMON, 3, 4.

RIGHT OF WAY.

See RAILROAD, 3 to 9.

SALE.

See CONTRACT, 2 to 4; DECEDENTS' ESTATES, 1 to 3, 5 to 7; PROMISSORY NOTE, 4; REAL ESTATE, 5 to 9; SEDUCTION, 5; SHERIFF'S SALE.

1. *Fraud.—Representations of Agency.—When Title Does not Pass.*—Where one fraudulently and falsely represents that he is the agent of a third person, and thereby, as such pretended agent, purchases personal property from another, who intends to vest the title in the supposed principal, the sale is void, vests no title in the impostor, and he can not by a subsequent sale confer title upon another.

*Peters Box, etc., Co. v. Lesh, 98*

2. *Same.—Demand.—Replevin.—Value of Property.—Measure of Damages.*—In such case, where the property, consisting of lumber and logs, has come into the possession of a third person, of whom the owner demands it, the measure of the owner's recovery, in an action for possession, is the value of the property at the time and place of the demand, less any additional value it may have had by reason of labor bestowed upon it, in good faith, previous to the demand. *Ib.*

3. *Same.—Estoppel.—Bills of Lading.*—If the seller of personal property, acting under the belief that the purchaser is the agent of another, and that he is selling the property to the latter, which belief is based on the representations of the fraudulent purchaser that he is such agent, permits the bills of lading to be made out in the name of such supposed agent, he is not thereby estopped to assert title as against a purchaser from the impostor. *Ib.*

SCHOOLS.

See TOWNSHIP TRUSTEE.

SCHOOL TEACHER.

See ASSAULT AND BATTERY.

SEDUCTION.

1. *Publication of Wrong.—Aggravation of Damages.*—In an action by an unmarried female for her own seduction it is proper to allege and prove, in aggravation of the damages, the publicity given by the defendant to the seduction. *Simons v. Busby, 13*
2. *Same.—Complaint.—Recovery of General Damages.*—Where the facts constituting the seduction are set out in the complaint, together with averments that the plaintiff was damaged by reason of the publicity given by the defendant to the wrong "and was otherwise injured," the plaintiff is entitled to general damages. *Ib.*
3. *Same.—Keeping Company with Other Women.—Irrelevant Evidence.*—The fact that the defendant kept company with other unmarried women during the time when he was visiting the plaintiff and when it is alleged he accomplished her seduction, is not admissible in evidence in an action to recover for the seduction. *Ib.*
4. *Same.—Instruction to Jury.—Declarations of Defendant.*—Where there is evidence to which it is applicable, an instruction that the jury, in

determining whether the preponderance of the evidence is with the plaintiff, may consider any statements made by the defendant in regard to the manner in which he accomplished the seduction and the conduct of the plaintiff at the time of the intercourse, is proper. *Ib.*

5. *Same. — Fraudulent Conveyance. — Sale of Real Estate. — Application of Proceeds.*—In an action for seduction and to set aside an alleged fraudulent conveyance of real estate by the deceased defendant, the court has authority to order the sale of the real estate by his administrator, who has appeared as a party, but it may not direct the proceeds to be applied in payment of the judgment to the exclusion of other creditors. *Ib.*
6. *Instruction.*—An instruction that a husband can not recover for the seduction of his wife if she consented to the sexual intercourse is bad. *Moore v. Hammons, 510*

### SETTLEMENT.

See CONTRACT, 12; PROMISSORY NOTE, 6.

### SHERIFF'S SALE.

See MORTGAGE, 1, 3; REAL ESTATE, 8, 13.

1. *Invalidity of. — Setting Aside Satisfaction of Judgment. — Re-Sale. — Parties. — Complaint.*—The grantee of a purchaser at a sheriff's sale, which is void because of a failure to observe the appraisement law, has no cause of action, as against those claiming the real estate, to set aside the satisfaction of the judgment and subject the property to re-sale or to redeem from an alleged illegal tax sale, and a joint complaint for that purpose by him and his grantor, who is the owner of the judgment, is bad. *Peters v. Guthrie, 44*
2. *Payment of Purchase Money. — Presumption* —Where the sheriff executes a deed to the purchaser, at a sale made by him, it will be presumed, in the absence of any showing to the contrary, that he collected from the purchaser the amount of the bid. *Meikel v. Meikel, 421*

### SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 3.

### SLANDER.

See LIBEL.

*Unmarried Female. — Abortion. — Examination of Person by Medical Experts.*—Where, in an action by an unmarried woman for slander, it is alleged that the defendant had spoken of the plaintiff that she was a whore, and had become pregnant, and had suffered an abortion to be procured upon her, the defendant is not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts. *Kern v. Bridwell, 226*

### SPECIAL FINDING.

See ASSAULT AND BATTERY, 2, 3; FRAUD, 3; LANDLORD AND TENANT, 1.

### SPECIAL JUDGE.

See CIRCUIT COURT; JUDGMENT, 8.

1. *Judge Pro Tempore. — Power to Appoint Successor.*—A judge *pro tempore*, whose competency is objected to by a party, has no power to appoint another person to serve as judge *pro tempore*, that power resting solely in the regular judge. *Cargar v. Fee, 536*
2. *Same. — Validity of Appointment. — Objection to.*—Where the authority of a *de facto* judge, acting under color of a temporary appointment, is promptly challenged and in a proper method, the question of the validity of his appointment is presented. *Ib.*

**SPECIAL VERDICT.**

See VERDICT.

**SPECIFIC PERFORMANCE.**

See CONTRACT, 7.

**STATUTE.**

See COUNTY COMMISSIONERS, 3, 4.

1. *Construction of.*—A statute must be construed so as to uphold it, if that be fairly possible; and if it be of doubtful constitutionality, the doubts are to be resolved in favor of the enactment.  
*Hovey v. State, ex rel. Carson, 395*
2. *Authentication of Act.*—*Absence of Governor's Signature.*—*Presumption.*—Where an act, which does not have the signature of the Governor, is certified by the legal custodian, and is properly authenticated and complete in form, judicial investigation is at an end, the conclusive presumption being that the act became a law in some constitutional method, without the approval, or notwithstanding the disapproval, of the Governor. *Ib.*
3. *Same.*—*Extraneous Facts not Admissible.*—The validity or proper authentication of an act can not be brought in question by instituting an inquiry of fact into matters extraneous to the act itself. *Ib.*

**STATUTE CONSTRUED.**

See APPRENTICE, 1; CONSTITUTIONAL LAW, 3, 4, 7, 11, 12; COUNTY COMMISSIONERS, 5, 6; CRIMINAL LAW, 18; GUARDIAN AND WARD; SUPREME COURT REPORTS; SURVIVAL OF CAUSE OF ACTION.

**STATUTE OF FRAUDS.**

See CHATTEL MORTGAGE, 4; CONTRACT, 4, 5.

**STATUTE OF LIMITATIONS.**

See CANALS; FRAUD, 2; REAL ESTATE, 7.

**STOCK AND STOCKHOLDER.**

See MANDAMUS, 1, 2.

**STREETS AND ALLEYS.**

See MUNICIPAL CORPORATION, 1; NEGLIGENCE, 1 to 3.

**SUNDAY.**

See CRIMINAL LAW, 8.

**SUPERIOR COURT.**

*Taxes.*—*Sale.*—*Foreclosure of Lien.*—*Jurisdiction of Marion Superior Court.*—The Superior Court of Marion county has jurisdiction of actions brought by persons holding invalid tax deeds to recover from the owners of the land the amount due, and to foreclose his lien.

*Meikel v. Meikel, 421*

**SUPREME COURT.**

See INSTRUCTIONS TO JURY, 1; JUDGMENT, 7; NEW TRIAL, 2; PRACTICE, 1; SUPREME COURT REPORTS.

1. *Transcript.*—*Omission of Evidence.*—*New Trial.*—*Presumption.*—Where the record shows upon its face that it does not contain all of the evidence, it will be presumed that the action of the trial court in overruling a motion for a new trial was right, where the causes assigned depend upon the evidence. *Lawrenceburgh, etc., Co. v. Hinke, 47*
2. *Special Finding.*—*Uncertainty.*—*New Trial.*—Where the special find-

- ings are uncertain and ambiguous upon material points, the judgment will be reversed for a new trial. *Security Company v. Arbuckle*, 69
3. *Practice.—Judgment upon Complaint Containing Bad Paragraph.*—Where judgment has been given for the plaintiff generally, without showing upon what paragraph of his complaint, error in overruling a demurrer to a bad paragraph will cause the reversal of the judgment, as the Supreme Court will not look to the evidence to determine whether or not injury resulted from the ruling. *Ryan v. Hurley*, 115
  4. *Motions in Trial Court.—Saving Questions upon.—Bill of Exceptions.—Practice.*—No question is presented on appeal upon the overruling of motions to separate the causes of action stated in the complaint, and to make the complaint more specific, and to strike out parts thereof, unless saved by a bill of exceptions or by a proper record made at the time. *City of Seymour v. Cummins*, 148
  5. *Assignment of Error Questioning Complaint for Review.—Sufficiency of.*—It seems that an assignment of error in the Supreme Court, questioning for the first time the sufficiency of a complaint to review a judgment, must be merely for the reason "that the complaint does not state facts sufficient to constitute a cause of action." *Hornady v. Shields*, 201
  6. *Instructions to Jury.—Practice.*—Where the record contains neither the evidence nor a statement of its character and tendency, questions made upon rulings on instructions will not be considered. *Smith v. Heller*, 212
  7. *Assignment of Error.—Practice.*—The giving or refusing to give instructions, and the overruling of a motion to strike out part of a verdict, can not be independently assigned as errors in the Supreme Court, but must be assigned as causes for a new trial in the motion therefor, and thus brought up for review. *Louisville, etc., R. W. Co. v. Hart*, 273
  8. *Errors.—Waiver.*—Alleged errors, which are not discussed by counsel, will be deemed waived. *Metzger v. Franklin Bank*, 359
  9. *Record.—Omission of Evidence.—Questions Not Considered.*—Where the record does not contain all of the evidence, questions depending upon the evidence will not be considered. *State, ex rel., v. Marsh*, 394
  10. *Assignment of Errors.—Attaching to Record.*—An assignment of errors is part of the record although pasted to the transcript. *Moore v. Hammons*, 510
  11. *Brief.—Waiver of Errors.*—Alleged errors, which are not discussed in the brief of counsel, are waived. *Sparklin v. Wardens, etc.*, 535
  12. *Assignment of Error.*—A joint assignment of error by several appellants presents no question as to a ruling affecting only one of them. *Ib.*
  13. *Practice.—Finding of Trial Court.—Inferences in Support of.*—The finding of the trial court will not be disturbed where the evidence supplies grounds for inferences in support of it. *Winslow v. Donnelly*, 565
  14. *Practice.—Questions Depending on Evidence.*—Questions which depend upon the evidence will not be considered where all the evidence is not in the record. *Lange v. Dammier*, 567

#### SUPREME COURT REPORTS.

*Publication and Sale.—Compensation of Reporter.—Act of 1889 Void.*—The act of March 4th, 1889 (Acts of 1889, p. 87), relating to the publication of the Supreme Court Reports and the compensation of the reporter, assumes to create an entire new system, and as that system can not be given effect, according to the legislative intent, in the absence of the provision requiring the judges of the Supreme Court to prepare the syllabi of all decisions, which provision has been declared unconsti-

tutional, the whole act is invalid, and the statutes enacted prior to its passage govern. *Griffin v. State, ex rel., 520*

**SURETY.**

See CONTRACT, 5, 6; MARRIED WOMAN; PRINCIPAL AND SURETY.

**SURVIVAL OF CAUSE OF ACTION.**

1. *Damages.—City.—Parties.*—A cause of action accruing to a person in his lifetime against a city for damages resulting from the construction of a ditch survives, and the administrator is the proper plaintiff.  
*City of Seymour v. Cummins, 148*
2. *Taxes.—False List.—Penalty.—Survival of Action for.*—A cause of action to recover the penalty imposed by section 6339, R. S. 1881, upon any person who gives a false and fraudulent list or statement of his taxable personal property, does not die with the taxpayer, but, under section 283, R. S. 1881, survives and may be maintained against his personal representative.  
*Davis v. State, ex rel., 555*
3. *Same.—New Right of Action.—Subject to General Statutes Regulating Limitation and Survival.*—Whenever a new right of action is given by statute, the right is subject to all general statutes regulating the limitation and survival of actions, unless it is expressly excepted therefrom.  
*Ib.*

**TAXES.**

See CONTRACT, 12; INTOXICATING LIQUOR; SURVIVAL OF CAUSE OF ACTION, 2, 3.

1. *Sale.—Foreclosure of Lien.—Jurisdiction of Marion Superior Court.*—The Superior Court of Marion County has jurisdiction of actions brought by persons holding invalid tax deeds to recover from the owners of the land the amount due, and to foreclose his lien.  
*Meikel v. Meikel, 421*
2. *Same.—Judgment Liens.—When Divested.*—A sale under a decree of the Marion Superior Court foreclosing a tax lien divests the liens of judgment creditors who are parties to the proceeding.  
*Ib.*
3. *Delinquency.—Penalty.—Becomes a Part of Tax.*—The ten per centum penalty assessed for the non-payment of taxes, under the statutes of this State, is not imposed solely as a punishment of the delinquent tax-payer, or intended to constitute a separate fund, but it attaches to and becomes a part of the taxes; and accordingly the penalty assessed on taxes levied for county purposes belongs to the county, and the penalty assessed on taxes levied for State purposes belongs to the State.  
*Board, etc., v. State, ex rel., 473*
4. *False List.—Penalty.—Survival of Action for.*—A cause of action to recover the penalty imposed by section 6339, R. S. 1881, upon any person who gives a false and fraudulent list or statement of his taxable personal property, does not die with the taxpayer, but, under section 283, R. S. 1881, survives and may be maintained against his personal representative.  
*Davis v. State, ex rel., 555*
5. *Same.—New Right of Action.—Subject to General Statutes Regulating Limitation and Survival.*—Whenever a new right of action is given by statute, the right is subject to all general statutes regulating the limitation and survival of actions, unless it is expressly excepted therefrom.  
*Ib.*
6. *Same.—Complaint to Recover Penalty.—Insufficiency of.*—It is only for failing to give a correct list of the property owned on the 1st day of April of any current year that the penalty is prescribed, and where the complaint to recover the penalty merely alleges that the taxpayer gave a false statement of the property owned by him "in the years 1885 and 1886," it is bad.  
*Ib.*



## TAX SALE.

See REAL ESTATE, 4 to 7; SHERIFF'S SALE, 1; SUPERIOR COURT; TAXES; TENANTS IN COMMON, 5.

## TENANTS BY ENTIRETIES.

See MARRIED WOMAN, 3, 4.

## TENANTS IN COMMON.

See REAL ESTATE, 3 to 6.

1. *Liens.—Contribution.*—Where one tenant in common pays off a lien existing against the joint property, he is entitled to contribution from his co-tenants to the extent of their interests, and to secure such contribution a court of equity will enforce upon the interests of the co-tenants an equitable lien of the same character as that removed.  
*Moon v. Jennings, 130*
2. *Same.—Quieting Title.*—A tenant in common is not entitled to have his title quieted as against his co-tenant, where the latter holds certificates of purchase issued by the sheriff upon a sale of the joint property under the foreclosure of a mechanic's lien thereon, as the latter is entitled to contribution.  
*Ib.*
3. *Crops.—Destruction by Third Person's Negligence.—Right of Action.*—Where, under an arrangement between the owner of land and another person, the latter harvests the hay grown upon the land and gathers the whole of the yield into stacks, he to have three-fifths of the hay and the owner of the land two fifths, the parties become tenants in common of the hay, and if it is destroyed by the negligence of a third person prior to a severance of their interests, they may maintain a joint action for damages.  
*Louisville, etc., R. W. Co. v. Hart, 273*
4. *Same.—Severance of Interests.—What Sufficient to Constitute.*—Prior to the destruction of the hay, each stack was measured and marked so as to leave three-fifths of the stack on one side of the division line and two-fifths on the other, the first portion being designated as that of the harvester and the second as that of the owner of the land, and it was agreed that either party could, at his convenience, cut the stacks and take the portion belonging to him. At the time of the destruction of the hay, no severance of the stacks had taken place.  
*Held*, that the common ownership continued until there was a manual separation or division of the property.  
*Ib.*
5. *Tax Sale.—Title.*—The rule that one tenant in common can not acquire title to the land of a co-tenant by purchasing the same at a tax sale, can not apply where, prior to the sale, the co-tenant conveyed his interest to the purchaser.  
*Meikel v. Meikel, 421*

## TITLE.

See CANALS; PARTITION; REAL ESTATE; SALE; TENANTS IN COMMON.

## TOWNSHIP.

See TOWNSHIP TRUSTEE.

## TOWNSHIP TRUSTEE.

See ASSAULT AND BATTERY.

1. *Common Schools.—Power to Purchase Books.*—A township trustee has no authority, either under section 4444, R. S. 1881, or under any other law of this State, to purchase, at the expense of the township, text-books for the use of the pupils attending the public schools of the township. *Jackson School Township v. Hadley, 59 Ind. 524, distinguished.*  
*Honey Creek School Township v. Barnes, 213*



2. *Same.* — *Complaint Against Township.* — *Sufficiency of.* — A complaint against a township to recover for books alleged to have been purchased by the trustee and used in the schools of the township, is bad unless it shows that the books were such as the trustee had power to buy. *Ib.*
3. *Same.* — *Notice of Trustee's Powers.* — School townships are corporations with limited statutory powers, and all who deal with a trustee of such a township are charged with notice of the scope of his authority, and that he can bind his township only by such contracts as are authorized by law. *Ib.*
4. *Discontinuance of School.* — *Discretion.* — *Mandamus.* — Where a township trustee, acting in good faith and in the exercise of his discretion, discontinues a school previously maintained in a school-house owned by the township, on account of the smallness of the attendance, his decision will not be reviewed by the courts, and mandamus will not lie to compel him to re-establish the school. *Tufts v. State, ex rel., 232*
5. *Same.* — *Omission to Enter Order of Discontinuance of Record.* — The trustee having reached a decision and given notice thereof, a mere omission to enter his order of discontinuance of record at the time it was made is not a material matter. *Ib.*

TRIAL BY JURY.

See COUNTY COMMISSIONERS, 4.

TRUST AND TRUSTEE.

See CONVEYANCE, 1 to 3; EXECUTORS AND ADMINISTRATORS.

TURNPIKE COMPANY.

See MANDAMUS, 2.

ULTRA VIRES.

See CORPORATION.

VARIANCE.

See JUDGMENT, 3.

VENDOR AND PURCHASER.

See CONVEYANCE; DEED; LANDLORD AND TENANT, 2; REAL ESTATE;  
WIDOW, 2 to 4.

VENDOR'S LIEN.

See WIDOW, 2 to 4.

VENIRE DE NOVO.

See VERDICT, 3.

VERDICT.

See REPLEVIN, 1, 2.

1. *Answers to Interrogatories.* — *When Controlling.* — It is only when the uncontradicted and consistent answers of the jury to interrogatories entitle a party to a judgment that they will prevail against the general verdict. *Smith v. Heller, 212*
2. *Answers to Interrogatories.* — *When Control General Verdict.* — Answers of the jury to interrogatories overthrow the general verdict only when there is such antagonism upon the face of the record as is beyond the possibility of being removed by any evidence legitimately admissible under the issues in the cause. *Indianapolis, etc., R. R. Co. v. Lewis, 218*
3. *Special.* — *Venire de Novo.* — *Practice* — An objection that a special verdict, which is otherwise sufficient, does not cover the issues in the cause, or so far cover them that the plaintiff is entitled to a judgment, is

not presented by a motion for a *venire de novo*, but by a motion for a new trial or by a motion for judgment on the verdict.

*Louisville, etc., R. W. Co. v. Hart, 273*

4. *Same.—Omission of Facts.—Harmless Error.*—When a special verdict contains no finding as to certain facts alleged in the complaint, such facts will be regarded as found against the plaintiff, and the refusal of the court to give instructions asked by the defendant relating to such facts is at most a harmless error. *Ib.*
5. *Same.—Motion to Strike Out.*—A motion to strike out part of the verdict of a jury will not lie, but if the part objected to is immaterial it will be treated by the court as surplusage. *Ib.*
6. *Same.—Instructions.*—Where a special verdict is demanded, it is improper to instruct the jury generally concerning the law of the case, but they may be instructed as to the nature of the action, the issues, the form of the verdict and their general duties. *Ib.*
7. *For Defendant.—When Court May Direct.*—The trial court may direct a verdict for the defendant when the essential facts showing that the plaintiff has no right to recover are not controverted, or where the plaintiff's evidence, with its legitimate inferences, is insufficient to sustain a verdict in his favor. *Hanna v. Terre Haute, etc., R. R. Co., 316*
8. *Answers to Interrogatories.—Judgment Upon.*—It is only where there is a direct conflict between the general verdict and the facts found by the jury in their answers to interrogatories that a motion for judgment on the answers, notwithstanding the general verdict, will be sustained. *Louisville, etc., R. R. Co. v. Crunk, 542*
9. *Special.—Formal Statements.—Omission of.*—Where the facts are properly stated, the omission of mere formal statements, or the usual formal conclusion, will not vitiate a special verdict.

*Louisville, etc., R. W. Co. v. Lucas, 583*

#### WABASH AND ERIE CANAL.

See CANALS.

#### WAIVER.

See CIRCUIT COURT; PLEADING, 8, 11; PRACTICE, 6; SUPREME COURT, 8, 11; WIDOW, 1; WILL, 8.

#### WARRANTY.

See INSURANCE.

#### WASTE.

*Injunction.—Descent.—Childless Second Wife.—Interest of, as Widow.*—As the only interest which a child by the first marriage of his father has in land set off to a childless second wife, upon the death of her husband, is a mere expectancy that he may inherit it from his stepmother in case he survives her, he can not maintain a suit to enjoin her from committing waste. *Gwaltney v. Gwaltney, 144*

#### WATER-WAYS.

See CANALS.

#### WATER-WORKS TRUSTEES.

See MUNICIPAL CORPORATION, 7 to 10.

#### WIDOW.

See FRAUD, 1; REAL ESTATE, 8; WASTE; WILL, 6, 7.

1. *Will.—Election.—Waiver of Rights under the Law.*—Where a testator by his will disposes of all his property and makes provision for his

widow, which she accepts, her right to the five hundred dollars allowed her by law is waived. *Hurley v. McIver, 53*

2. *Rights in Husband's Real Estate.—Land Held by Contract.*—Where a husband has made a contract for land, but dies leaving a part of the consideration unpaid, his widow is entitled to her statutory interest therein if the land not set off to her is sufficient to pay the unpaid purchase-money. *Bowen v. Lingle, 560*
3. *Same.—Liens.—Payment of.—Rights of Widow.*—Upon the death of a husband an equity intervenes in favor of his widow to have all the personal property of her deceased husband, and the proceeds of all his real estate to which she is not entitled under the law, applied to the payment of the liens on the land of which he died seized. *Ib.*
4. *Same.—Mortgage.—Vendor's Lien.—When Widow Holds her Interest Freed.*—A mortgage which a wife joins her husband in executing upon his land, to secure his debt, in no manner affects her rights in other lands belonging to her husband; and if the latter dies holding land for which he has contracted but not paid, and a portion of which his wife has joined him in mortgaging to a third person, and the widow, by proper proceedings, has her interest set off to her from the portion of the land not mortgaged, the mortgagee can not, as against the widow, compel the person holding the purchase-money lien to resort to the land set off to her before selling the land covered by the mortgage, and if the land not set off to her is sufficient to pay the vendor's lien, she holds free from the liens of both vendor and mortgagee. *Ib.*

#### WILL.

See COSTS, 2; WIDOW, 1.

1. *Interpretation.—Intention.*—Whatever method may be resorted to for the interpretation of a will, it must be applied solely with a view to arrive at the intention of the testator, as his intention may be gathered from the language found in the instrument itself. *Daugherty v. Rogers, 254*
2. *Same.—Latent Ambiguity.*—A latent ambiguity, which will justify the admission of evidence of extrinsic facts, is one which may arise, not upon the face of the will itself, but from facts therein referred to, which are extrinsic to the instrument. *Ib.*
3. *Same.—Evidence.—Extrinsic Facts.*—Whenever, in applying a will to the objects or subjects therein referred to, extrinsic facts appear which produce a latent ambiguity, the court may inquire into every other material extrinsic fact or circumstance to which the will refers, and to the relation which the testator occupied to those facts, in order to arrive at a correct interpretation of the language actually employed. *Ib.*
4. *Same.—Presumption that Words are Used in Primary Sense.—When Contrary May be Shown.*—A testator is presumed to have used the words in which he expressed his intentions according to their strict and primary acceptation, and if, when applied to the extrinsic facts referred to, they are sensible, parol evidence is not admissible to show that they were used in some other sense; but it is otherwise if the words, in their strict and primary sense, are meaningless when applied to such extrinsic facts. *Ib.*
5. *Same.—Notes Executed by Legatee to Testator.—When Discharged.—Ambiguity.—Extrinsic Evidence.*—A testator bequeathed "to Philo Rogers, the young man I raised, in addition to what I have already given him, the further sum of five hundred dollars." At the time the will was executed the testator held six notes against Rogers, aggregating six thousand dollars. Upon his death they were found among his assets, and suit was brought thereon by his administrator against Rogers. The defendant answered that he had been reared in the

family of the testator, who was a man of fortune, and who had often expressed an intention to make liberal provision for the defendant; that the testator had, prior to the execution of the will, advanced money to the defendant in anticipation of the testamentary provision which he intended to make for him, taking the notes in suit merely as memoranda of the amounts and dates; that no other money or property had ever been given to him by the testator; that the words "in addition to what I have already given him," employed in the will, had reference to the money represented by the notes, and that the will released and extinguished such notes.

*Held*, that evidence to sustain the answer, including declarations made by the testator, was admissible, a latent ambiguity being developed by the extrinsic facts referred to in the will, and that, upon proof of the facts alleged, a judgment for the defendant was proper.

*Held*, also, that as the word "given," used in the will, if taken in its strict and primary sense, is meaningless when applied to the extrinsic facts referred to, it was competent to show that it was used in the secondary sense of "furnished" or "supplied." *Ib.*

6. *Widow.—Emblements.*—A testator's will provided that his wife should receive during her life one-third of all grain raised on certain land, the same to be delivered to her in the county at any point she might designate, as soon as it should be harvested and prepared for the market according to good husbandry. The title to the land and the right of possession were vested in other persons. The provision for the widow's benefit was made a charge upon the land. She regularly received from the occupants of the land one-third of the grain harvested up to the time of her death, which occurred in the month of May, several years after the testator's death. Her administrator now seeks to recover the value of one-third of the crops planted prior to her death but not harvested and prepared for the market until after that time.

*Held*, that as the time for harvesting and delivering the grain, as provided in the will, had not arrived at the time of the widow's death, there was nothing to go to her legal representatives, and that the action can not be maintained. *Miller v. Wohlford, 305*

7. *Partial Intestacy.—Widow.—Election to Take under Law.—Descent.*—Where a widow refuses to accept the provision made for her by her husband's will and elects to take under the law, she takes one-third of his land in fee, and, if he leaves no child and no father or mother, she also takes, under section 2490, R. S. 1881, any portion of his estate left undisposed of by the will, and no more.

*Morris v. Morris, 341*

8. *Same.—Contest of.—Mental Capacity.—Evidence.—Physician's Privileged Knowledge.—Waiver of Privilege*—In a proceeding to contest a will on the ground of the mental incapacity of the testator, the executor or administrator, as the legal representative of the patient, and seeking to maintain the will, has the right to waive the privileged character of knowledge acquired by a physician, while attending the testator in his last illness, as to the latter's mental condition, and call him as a witness to testify as to such mental condition when the will was executed. *Ib.*

9. *Construction of.—Vested Remainder.*—A testator devised land to his daughter for life, with remainder over in fee to her child or children, in case she should survive him, leaving a child or children. By a subsequent clause of the will the testator devised to his widow a life-estate in the same land, and after her death to his right heirs in fee. The daughter survived the testator, but died soon after, leaving a son, who also died, leaving a son. The latter died unmarried and with-

out issue, leaving the testator's widow, his great-grandmother, as his next of kin.

- Held*, that the daughter's son took a vested remainder in fee, which was in nowise affected or cut down by the doubtful expressions contained in the subsequent clause of the will, and that it passed to the testator's widow upon the death of her great-grandson. *Bruce v. Bissell*, 525
10. *Collateral Attack upon.—Action to Quiet Title.*—A will which has been duly admitted to probate in another State can not be attacked in an action to quiet title brought in this State, although the execution of the will was procured by fraud. *Winslow v. Donnelly*, 565
11. *Contest.—Bond.—Time of Filing.*—While a proceeding to contest a will should be dismissed if the bond required by the statute is not filed, yet if a good bond is tendered after the proceeding is commenced it should be accepted. *Lange v. Dammier*, 567
12. *Same.—Complaint to Contest.*—General allegations that a will was unduly executed, and that the testator was a person of unsound mind, make a complaint good under the statute relating to the contesting of wills. *Ib.*
13. *Same.—Probate.—Res Judicata.*—Query, whether the record of the probating of a will has the effect of an ordinary judgment, and is conclusive as to the due execution of the will, except in an action under the statute to contest its validity. *Ib.*

WITNESS.

See WILL, 8.

1. *Examination of Party.—Cross-Examination.—Competency of.*—A party who is examined as a witness at the instance of the adverse party, prior to the trial, under section 509, R. S. 1881, may also be cross-examined, and the cross-examination is competent evidence in his behalf. *Mosier v. Stoll*, 244
2. *Examination of Party.—Notice of.—Contempt.—Striking Out Pleadings.*—A party's pleadings can not be stricken out, under section 513, R. S. 1881, because of his failure to appear for examination at the instance of the adverse party, unless the process requiring his appearance is issued by some proper court or officer, and he is in contempt thereof. *White v. D. S. Morgan & Co.*, 338

WORDS AND PHRASES.

See JUDGMENT, 2; WILL, 4.

WORK OF NECESSITY.

See CRIMINAL LAW, 8.

END OF VOLUME 119.

Enc. J. G.





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